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96-8986

Supreme Court, U.S.
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No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that this Court conclusively determined does not constitute a federal crime has made "a substantial showing of the denial of a constitutional right" warranting issuance of a certificate of appealability under 28 U.S.C. § 2255.

2. Whether a defendant's failure to raise an argument on direct appeal, when that argument was foreclosed by binding circuit precedent and had been uniformly rejected by other circuits, constitutes a knowing and intelligent "waiver," precluding any showing of "cause and prejudice" or other excuse for the procedural default in a collateral review proceeding.

3. Whether a defendant who possesses a firearm and drugs in close proximity to each other, but neither bears the firearm on his person, nor otherwise transports it, commits the crime under 18 U.S.C. § 924(c) of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of the drugs with intent to distribute them.

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PETITION FOR A WRIT OF CERTIORARI

Arnold F. Hohn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 99 F.3d 892. The order denying rehearing en banc (Pet. App. 21a) over the dissent of Judges Beam, Hansen, Loken, and McMillian is unreported. The opinion of the court of appeals affirming petitioner's conviction on direct appeal (Pet. App. 14a-20a) is reported at 8 F.3d 1301.

JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit denying Hohn's petition for rehearing was entered on February 10, 1997. Pet. App. 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2253(c) of Title 28 of the United States Code provides, in pertinent part: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under Section 2255. * * * A certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in pertinent part: "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *."

Section 924(c)(1) of Title 18 of the United States Code provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses

or carries a firearm, shall, in addition to the punishment provided for such crime * * *, be sentenced to imprisonment for five years * * *, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment * * *."

STATEMENT

Arnold Hohn was convicted and is presently incarcerated for conduct — purportedly "using" a firearm by merely having it "available" to him during his possession of a controlled substance — which this Court held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), is not a crime. After learning of the *Bailey* decision, Hohn filed a motion seeking collateral relief pursuant to 18 U.S.C. § 2255 from his unlawful incarceration.

The district court denied Hohn's collateral challenge, finding that he had "waived" it by failing to prognosticate that this Court, several years after Hohn's conviction had become final, would reverse well-settled precedent and redefine the meaning of the criminal statute under which he was charged. Pet. App. 8a-9a. The court of appeals refused to accept Hohn's appeal, relying on a provision of the new Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. 2253(c), which allows an appeal to be taken from the denial of a Section 2255 motion only upon the issuance of a "certificate of appealability" (which in turn requires the movant to make "a substantial showing of the denial of a constitutional right"). 28 U.S.C. § 2253(c). In the court of appeal's view, Hohn's claim that he was incarcerated for conduct that was not a crime did not meet that standard because Hohn was asserting the denial of a "statutory" rather than a "constitutional" right.

1. On June 20, 1990, police armed with a no-knock warrant searched Hohn's home after a confidential informant told them that Hohn was selling methamphetamine. Pet. App. 15a.

They testified that they found three firearms near methamphetamine in the kitchen (Tr. 163-168), two firearms in a box in the kitchen (Tr. 418-420), and one firearm a few feet away from methamphetamine in the bedroom (Tr. 212). In Hohn's bedroom, the police also observed a wall-mounted gun case containing a collection of rifles and shotguns (Tr. 508-509). When they arrested him in his living room, Hohn was not carrying any weapon and no weapons were found in the living room. Pet. App. 3a; Tr. 367-368.

At trial, no witnesses testified that they had observed Hohn use or carry any weapon during and in relation to his predicate offense. Hohn admitted possession of the methamphetamine and firearms but testified that he owned the firearms because he is an avid hunter and gunsmith, and because his house had been burglarized and vandalized repeatedly. Pet. App. 3a; Tr. 1107-1110. Only one witness, Cindy Vandry, testified to having purchased, or witnessed a purchase, of drugs from Hohn. Vandry admitted that she had never seen Hohn use or carry any weapon (Tr. 454, 456), and that the only weapons she had observed when she visited his home were located in a closed, wall-mounted gun case (Tr. 454-455).

Consistent with then-controlling Eighth Circuit precedent and Eighth Circuit Model Jury Instructions (see note 1, *infra*), the trial court gave the following instruction to the jury on the meaning of the terms "use" and "carry" in 18 U.S.C. § 924(c):

> The phrase 'used a firearm' means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase 'carried a firearm' does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

Pet. App. 31a; see also *id.* at 29a-30a. The trial judge gave the instruction over the objection of Hohn's attorney, who argued that it improperly "allowed the jury to find that merely having a firearm available" nearby during a drug offense constitutes "use." Pet. App. 28a-30a.

Hohn was convicted of drug possession, firearm possession, and "using or carrying" a firearm in violation of Section 924(c). On July 8, 1992, Hohn was sentenced to 90 months — 30 months for other crimes and 60 months (to be served consecutively) for the Section 924(c) conviction. Hohn has been incarcerated for the last three years solely based on his conviction for "using or carrying" a firearm in violation of Section 924(c).

2. Hohn appealed to the Eighth Circuit, but did not challenge the "use or carry" jury instruction or his conviction under Section 924(c). At the time of his appeal, the Eighth Circuit — like most other courts — had repeatedly interpreted the term "use" in Section 924(c) expansively to include the "mere presence and availability" of a firearm in a house in which drugs were discovered.[1] Thus, the jury instruction given at Hohn's trial was consistent with controlling, well-established Eighth Circuit law, and any argument to the contrary would have been rejected, if not dismissed as frivolous. Hohn's conviction was affirmed. Pet. App. 14a-20a.

3. Several years after Hohn's conviction was affirmed, this Court issued its decision in *Bailey*, substantially narrowing the range of conduct the lower courts had deemed criminal under

[1] *E.g.*, *United States* v. *Boykin*, 986 F.2d 270, 274 (8th Cir. 1993) ("The government does not need to show that the defendant was in actual physical possession of the firearm, or that he brandished it or discharged it."); *United States* v. *Sykes*, 977 F.2d 1242, 1248 (8th Cir. 1992) ("It is inconsequential that the gun was located in a different room from where the drug transactions occurred."); *United States* v. *Drew*, 894 F.2d 965, 968 (8th Cir. 1990) ("the mere presence and ready availability of a firearm at a house where drugs [have been] dealt" is sufficient to support a 924(c) conviction); EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS (CRIMINAL) § 6.18.924, at 197-199 & n.9 (1994).

Section 924(c)'s "use" prong. The Court held that, to "use" a firearm within the meaning of Section 924(c), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, * * * firing or attempting to fire" the weapon. *Id.* at 508-509. The Court explicitly overruled those circuit court opinions, like the Eighth Circuit's, in which the only nexus required between a firearm and drugs was the "availability," "accessibility," or "proximity" of the firearm to the defendant during the predicate offense. *Id.* at 506, 508.

Because Hohn had neither "used" a firearm as this Court interpreted that term in *Bailey*, nor "carried" one, and hence was incarcerated for conduct that Section 924(c) does not criminalize, he moved to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The government conceded in its response to Hohn's Section 2255 motion that the jury instruction on firearm "use" contravened this Court's decision in *Bailey*. Pet. App. 23a. Nevertheless, the district court dismissed Hohn's petition because, in its view, Hohn had knowingly and intelligently "waived" his right to relief by failing to "raise his *Bailey* claim" on direct appeal, several years prior to the date on which *Bailey* was decided. Pet. App. 8a (citing *United States* v. *McKinney*, 79 F.3d 105, 109 (8th Cir. 1996)). In dismissing Hohn's Section 2255 motion, the district court neither explored the applicability of doctrines (such as cause and prejudice) under which a "waiver" (or procedural default) has traditionally been excused, nor examined the merits of Hohn's *Bailey* claim.

4. Hohn then applied to the Eighth Circuit for a certificate of appealability. Under Section 2253(c) of the recently enacted the AEDPA, federal and state prisoners who have received an adverse ruling on a Section 2254 or 2255 motion in district court must obtain a "certificate of appealability" as a precondition to appeal. 28 U.S.C. § 2253(c). A certificate

may issue only upon a "substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2).

Over the vigorous dissent of Judge McMillian, the panel denied Hohn's request for a certificate of appealability. The majority explained that the AEDPA's requirement of a "substantial showing of the denial of a constitutional right" (*ibid.*) had not been satisfied because, in its view, "petitioner is not making a constitutional claim," but rather is "making a claim [*only*] to a federal statutory right." Pet. App. 1a-2a. In support of that proposition, the majority cited the fact that this Court in *Bailey* "did no more than interpret a statute." *Id.* at 2a. The majority rejected the argument that the Constitution forbids the government from incarcerating an individual for conduct that is not a crime. It reasoned: "The Constitution does not guarantee that judges will always be right." *Ibid.*

In dissent, Judge McMillian argued that Hohn's claim for relief from incarceration is clearly rooted in the Fifth Amendment's Due Process Clause. *Id.* at 5a-7a. He explained that the Due Process Clause forbids continued incarceration of a person based on a conviction for conduct that this Court has determined is not criminal. *Id.* at 5a. The panel majority, however, found unpersuasive the series of Supreme Court and appellate cases, cited by Judge McMillian, in which post-conviction relief routinely has been granted on the basis of subsequent interpretations narrowing the reach of substantive criminal law. *Id.* at 5a-6a.[2]

Hohn petitioned for rehearing, arguing that his claim was premised on a denial of his due process right not to be incarcerated for conduct that this Court has decided does not constitute

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[2] One month later, the Eighth Circuit decided *United States* v. *Apker*, 101 F.3d 75 (1996), addressing the same issue. Judge Henley wrote a concurrence to criticize the *Hohn* decision, which he acknowledged was binding, and to recommend that the Eighth Circuit consider taking *Apker* or *Hohn* for en banc review. *Id.* at 76.

a crime. See Pet. for Reh'g. at 7-9. He also challenged (*id.* at 13-15) the draconian "waiver" rule the district court had applied to bar his claim, pointing out that the decision on which the doctrine is based, *McKinney*, 79 F.3d at 109, has only tenuous support even in the Eighth Circuit: Chief Judge Arnold and Judges Hansen, Loken, McMillian, and Murphy all voted to rehear *McKinney* en banc. The court of appeals denied Hohn's petition for rehearing and suggestion for rehearing en banc on February 10, 1997. Pet. App. 21a. Judges Beam, Hansen, Loken, and McMillian all dissented from the denial of en banc rehearing.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE UPON A SECTION 2255 PETITIONER'S SUBSTANTIAL SHOWING THAT HE IS INCARCERATED FOR CONDUCT THIS COURT HAS HELD IS NOT A CRIME IS IMPORTANT AND RECURRING

A. The Proper Interpretation of Section 2253(c)'s Appealability Requirement of a "Substantial Showing of the Denial of a Constitutional Right" Is a Question of Great Importance and Will Affect Countless Cases

Section 2253(c)(2) of the AEDPA is the first limitation Congress has imposed on the availability of appellate review of federal prisoners' collateral challenges to their convictions under Section 2255 since that statute was adopted almost fifty years ago. The proper scope of this new limitation on appellate review is an important and recurring issue of federal law that will significantly affect the proper administration of justice in the federal courts.

It cannot seriously be disputed that the federal courts will frequently be required to interpret and apply Section 2253(c)(2). As this Court is well aware, innumerable Section 2255 petitions are filed every year. In every Section 2255 case in which relief is denied, the petitioner will have an incentive to take an appeal; and, under the AEDPA, no appeal will lie unless a certificate of appealability is issued. The question presented in this case — whether

Section 2253(c)'s reference to "constitutional rights" restricts the type of cases that may be appealed, and in particular forecloses an appeal such as petitioner's — therefore can be expected to arise with great regularity in the federal courts.

This Court often renders substantive law decisions narrowing the perceived reach of criminal statutes.[3] Each such decision calls into question the validity of hundreds of convictions premised on the lower courts' erroneously broad constructions.[4] Section 2255 motions are the primary avenue of relief for such wrongfully incarcerated persons. Literally hundreds of Section 2255 challenges have been filed as a consequence of this Court's decision in *Bailey* alone. Thus, the question whether Section 2253(c) forecloses appeal as an avenue of relief for persons who are incarcerated for engaging in lawful conduct, as the court below held, will arise often. The same question of appealability presented here also will arise in *all* unsuccessful collateral challenges premised on statutory grounds.

In addition to arising with great frequency, the proper meaning of Section 2253(c) is an issue of great importance. Limitation of appellate review in large numbers of federal post-conviction cases will substantially restrict its salutary and unifying effect, leading to intracircuit differences in how district courts resolve issues in Section 2255 cases. By the same token, a

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[3] See, *e.g.*, *Bailey*, 116 S. Ct. at 508; *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (requiring, for a conviction under 31 U.S.C. §§ 5322(a) and 5324(3), that "the jury had to find [defendant] knew the [cash transactions] structuring in which he engaged was unlawful" — an element of the crime several courts of appeals had not previously required); *McNally* v. *United States*, 483 U.S. 350 (1987) (rejecting the widely accepted interpretation in the courts of appeals of the mail-fraud statute, 18 U.S.C. §§ 1341, 1343, as prohibiting schemes to deprive citizens of their intangible right to the honest and loyal services of a public official).

[4] See, *e.g.*, *Criminal Use of Guns: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (May 8, 1997), 1997 WL 10571065 (Statement of T. Hungar) ("As a result [of *Bailey*], countless convictions under Section 924(c) have been reversed or vacated * * *.") (citing cases); *DOJ Moves to Counter Impact of Ratzlaf*, 4 No. 2 DOJ ALERT 10 (Feb. 7, 1994) ("The ruling [of the Supreme Court in *Ratzlaf*] undermined an estimated 200 past corruption convictions based on mail fraud * * *.").

prohibition on appellate review will decrease the opportunies for error correction. For federal prisoners convicted of conduct this Court later determines is not a crime, the district court will be the first, last, and only forum for Section 2255 relief from incarceration.[5] If the district court fails to grant relief — as did the district court below, on a misguided "waiver" theory (see *infra*, Section II) — an individual convicted only of *lawful* conduct may languish in prison without recourse. The court of appeals' interpretation of Section 2253(c) similarly would preclude any appeal from the denial of "statutory" claims (however meritorious) that a prisoner's sentence exceeds the maximum permitted by law, or that the convicting court lacked personal or subject matter jurisdiction, notwithstanding that Section 2255 expressly authorizes (see 28 U.S.C. § 2255), and courts historically have granted (see *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1874); *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830)), habeas relief for such claims. Thus, the Eighth Circuit's interpretation of Section 2253(c) will, unless corrected, inflict on many federal prisoners a profound injustice.

B. The Eighth Circuit's Analysis is Incorrect

Section 2253(c)(2) requires that a Section 2255 petitioner make "a substantial showing of the denial of a constitutional right" as a prerequisite to appeal. The court below interpreted that requirement to bar appeal in cases involving an alleged violation of a "federal statutory right" — a category it deemed to include a prisoner's claim that he is incarcerated based on a conviction for conduct that is not criminal. The decision is patently incorrect for two reasons.

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[5] Although a federal prisoner may seek a writ of habeas corpus in the district of confinement pursuant to 18 U.S.C. § 2241, such relief is available only when Section 2255 is "inadequate or ineffective to test the legality of his detention" (28 U.S.C. § 2255) — a standard that is not often met, even when the Section 2255 court has incorrectly refused to grant relief. See LARRY W. YACKLE, POSTCONVICTION REMEDIES § 30, at 154 (1981).

First, it is difficult to conceive of a more egregious denial of the constitutional right to due process than incarceration for conduct that this Court has conclusively decided is not a crime. Hohn's claim therefore plainly falls within the scope of Section 2253(c). Second, even if the "statutory" label the court below attached to Hohn's claim were accurate, Section 2253(c) cannot properly be interpreted to bar his appeal. A reading of Section 2253(c) in context with other relevant provisions of the AEDPA makes apparent that Congress used the term "constitutional right" interchangeably with the term "federal right," and did not intend Section 2253(c) to sever the appeal rights of federal prisoners on their statutory claims.

1. The court below decided not to issue a certificate of appealability solely becuase it deemed Hohn's claim — that he is incarcerated for conduct this Court has determined to be lawful — to be "a claim to a federal statutory [rather than constitutional] right." Pet. App. 2a. That was plainly wrong. As Judge Posner has correctedly explained, "If you argue that Statute X does not make your act a crime, you are making a *statutory argument*, but in support of a *due process claim*." *Johnson* v. *United States*, 805 F.2d 1284, 1288 (7th Cir. 1987) (Posner, J.) (emphasis added). Hohn need not "claim" that the "using" provision of Section 924(c) does not prohibit the conduct of which he was convicted — this Court conclusively decided that point in *Bailey*. Instead, Hohn claims that *because* the Court has decided that the conduct of which he was convicted is not criminal, his continuing incarceration is unlawful. That claim is *constitutional* because "punishing a person for engaging in conduct that the polity has not made criminal" violates the constitutional guarantee against a deprivation of liberty without due process of law. *Ibid.*

a. *Bailey applies retroactively, making the conduct of which Hohn was convicted lawful.* This Court has held that decisions like *Bailey*, which narrow the construction lower courts have given to *substantive* criminal statutes (unlike most decisions creating new *procedural* rules, see, *e.g.*, *Teague* v. *Lane*, 489 U.S. 288 (1989)), are retroactive. See *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974).[6] "There can be no room for doubt" that "conviction and punishment * * * for an act" the Court has subsequently determined "the law does not make criminal * * * 'inherently results in a complete miscarriage of justice'" and requires retroactive application of the clarifying judicial decision. *Ibid.* (citation omitted). See also *United States* v. *Johnson*, 457 U.S. 537, 550 (1982) ("[F]ull retroactivity [i]s a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place.").[7] Not surprisingly, in the year and a half since this Court issued its decision in *Bailey*, the lower courts uniformly have concluded that the decision must be applied retroactively to persons convicted prior to the Court's pronouncement. See, *e.g.*, *Bousley* v. *Brooks*, 97 F.3d 284 (8th Cir. 1996),

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[6] The Court has applied a different rule to "new constitutional rules of criminal procedure," generally barring their retroactive application on collateral review. *Teague* v. *Lane*, 489 U.S. 288, 310 (1989). Unlike substantive law changes, which reveal beyond doubt that a defendant has been wrongfully convicted of conduct that is not a crime, procedural law changes do not always implicate the accuracy of the conviction and sentence. Procedural law changes accordingly are retroactive only when they are so "fundamentally unfair" as to "seriously diminish[]" "the likelihood of an accurate conviction." *Id.* at 290. As the Court explained in *Teague*, few "components of basic due process" that are "so central to an accurate determination of innocence or guilt" have not yet emerged, and thus retroactive application of new procedural rules is rarely required. *Id.* at 313. In contrast, all substantive law determinations that the conduct of which a defendant was convicted is not criminal are "central to an accurate determination of innocence or guilt." See *United States* v. *McKie*, 73 F.3d 1149, 1152-1153 (D.C. Cir. 1996).

[7] This principle of retroactivity of decisions that narrow the perceived scope of a criminal prohibition is compelled by the common-sense proposition that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994).

pet. for cert. filed (U.S. Mar. 18, 1997) (No. 96-8516); *United States* v. *Cota-Loiaiza*, 936 F. Supp. 751, 753-754 (D. Colo. 1996) (listing cases).

b. *Incarceration for lawful conduct is a core violation of the constitutional right to Due Process of law.* The Due Process Clause commands that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. This Court has often recognized that there are two components to that clause. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). And "procedural due process" requires that "[w]hen government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner." *United States* v. *Salerno*, 481 U.S. 739, 746 (1987).

The government's continuing incarceration of Hohn for conduct this Court has concluded is not a crime violates both components of due process. It is difficult to imagine a right more fundamental or "implicit in the concept of ordered liberty" than the right of a person to be free from punishment for conduct that is not proscribed by any law. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); *North Carolina* v. *Pearce*, 395 U.S. 711, 738 (1969) (Opinion of Black, J.); cf. *BMW* v. *Gore*, 116 S. Ct. 1589, 1598 & n. 19 (1996) (holding that a state does not have the power to punish an individual for lawful conduct). This Court already has held that it is beyond dispute that "conviction and punishment" of a person for an act that the Court later concluded is not criminal "inherently results in a complete

miscarriage of justice." *Davis*, 417 U.S. at 346-347. Several courts of appeals, in reliance on *Davis*, have recognized that continued incarceration for conduct this Court has declared not to be criminal is a violation of due process. See, *e.g.*, *id.*; *United States* v. *Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976); see also *Apker*, 101 F.3d at 76 (Henley, J., concurring).

Hohn's continuing incarceration violates the most basic of his procedural due process rights: the government has failed both to prove each element of his purported crime beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 363 (1970); *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979). The government has never offered any evidence, let alone proven, that Hohn "actively employed" or "carried" a firearm. Pet. App. 4a-5a (McMillian, J., dissenting).

2. Even if the lower court's dubious conclusion (Pet. App. 2a) that Hohn is claiming a denial of his "statutory" (rather than constitutional) rights were correct, the court nevertheless erred in holding that Congress had abolished all appeals of such "statutory" claims. Although Section 2253(c)(2) authorizes a certificate of appealability to be issued only upon a "substantial showing of the denial of a constitutional right," the statute must be read as a whole and in light of its legislative history. See *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843 (1997). Such a reading clarifies that this term encompasses substantial claims of denial of *statutory* rights. The lower court's holding to the contrary would radically truncate the availability of appellate review of Section 2255 petitions, relegating many federal prisoners to one solitary opportunity in the district court to have even the most meritorious statutory claims heard — a drastic change in the law that no evidence suggests Congress intended.

Congress used the terms "constitutional right" and "federal right" interchangeably in the AEDPA and appears to have regarded them as synonymous. Section 2253(c)(2) authorizes

appeal upon a "substantial showing of the denial of a *constitutional* right." (emphasis added). In another section of the amended statute, however, Congress referred to *precisely the same authorization to appeal* as requiring a "substantial showing of the denial of a *Federal* right." 28 U.S.C. § 2262(b)(3) (emphasis added).[8] Further, Sections 2254 and 2255 continue to authorize a writ of habeas corpus to be granted if a person is held "in violation of the Constitution *or laws* of the United States," thus expressly authorizing relief from incarceration that violates only statutory rights. 28 U.S.C. §§ 2254, 2255 (emphasis added).

The legislative history and an examination of the purposes of the statutory habeas scheme resolve the ambiguity created by the statute's inconsistent terms. *Cf. Robinson*, 117 S. Ct. at 848. Congress modeled the "certificate of appealability" requirement, which applies equally to state and federal prisoners, on the former requirement that state prisoners obtain a "certificate of probable cause" indicating that a prisoner's claims were sufficiently substantial to warrant apellate review. See H.R. REP. NO. 23, 104th Cong., 1st Sess. 9 (1995) ("The bill thus enacts the standard of *Barefoot* v. *Estelle*, 463 U.S. 880 (1983)"). In *Barefoot*, 463 U.S. 881, 893 n.4, this Court held that a state prisoner meets the prerequisites for a certificate of probable cause by making a "substantial showing of the denial of a *federal right*." *Id.* at 881 (emphasis added). Several courts of appeals have correctly concluded that the AEDPA was meant to codify the *Barefoot* "federal right" standard for entitlement to an appeal. See, *e.g.*, *Santana* v. *United States*, 98 F.3d 752, 757 (3d Cir. 1996), pet. for cert. filed (U.S. Mar. 19, 1997) (No. 96-1443).

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[8] That section provides that a stay of execution shall be issued in a capital case upon application by the prisoner to any court for habeas relief; but mandates that the stay "shall expire if * * * a State prisoner * * * fails to make a *substantial showing of the denial of a Federal right* or is denied relief in the district court or at any subsequent stage of review." 28 U.S.C. § 2262(b)(3) (emphasis added).

The *Barefoot* "federal right" standard did not preclude appeal of a claim based on a federal statutory right, as the court below contends the certificate of appealability standard should be interpreted to do. Instead, it merely ensured that, regardless from which source of law (Constitution, federal statute, treaty) a habeas claim derived, it would proceed to appeal only if it presented a question of substance. See *Barefoot*, 463 U.S. at 893 n.4, 894 (holding that a claim is appealable if it is "'debatable among jurists of reason'" or is not "squarely foreclosed by *statute, rule* or authoritative court decision") (emphasis added) (citation omitted). "Although virtually all habeas corpus petitions" by state prisoners — and hence appeals from their denial — "raise federal *constitutional* claims" (POSTCONVICTION REMEDIES, *supra*, § 91, at 360 (emphasis in original)), Section 2254 has always authorized state prisoners' claims that their incarceration violates the "Constitution or *laws or treaties* of the United States." 28 U.S.C. § 2254(a) (emphasis added). This Court recently recognized that a state prisoner's claim of a serious violation of federal *statutory* law can warrant federal habeas relief under the same circumstances as would a federal prisoner's statutory claim. See *Reed* v. *Farley*, 114 S. Ct. 2291, 2299-2300 (1994). See also POSTCONVICTION REMEDIES, *supra*, § 91, at 360-362. Nothing in *Barefoot* suggested an intent to bar state prisoners from appealing such claims.

Because the overwhelming majority of habeas petitions and appeals by state prisoners invoke constitutional rights (see *id.*), Congress appears to have assumed that the *Barefoot* requirement that petitioners make a substantial showing of denial of a "federal right" is synonymous with the requirement that they make such a showing of a "constitutional right."

Particularly in the context of *federal* Section 2255 motions for relief (which often assert violations of statutory rights), however, that characterization is incorrect.[9]

That Congress gave no thought to this difference in extending the certificate of probable cause requirement to federal prisoners is apparent. In its amendment of Federal Rule of Appellate Procedure 22 to provide procedures for the new certificate of appealability requirement, Congress referred *exclusively* to *State* prisoners' petitions for relief. The amended Rule suggests that *only* State prisoners are required to obtain certificates of appealability and provides judicial procedures for addressing only *State* prisoners' appeals. See Fed. R. App. P. 22(b).

The lower court's interpretation of Section 2253(c) as eliminating federal prisoners' right to appeal from denial of even highly meritorious statutory claims would severely undermine the purpose of the statutory collateral challenge scheme. Section 2255 is, "'[a]s a remedy, * * * intended to be as broad as [the common law remedy of] habeas corpus.'" *United States* v. *Hayman*, 342 U.S. 205, 217 (1952) (quoting Statement by Judicial Conference Committee on Habeas Corpus Procedures). We have found nothing in the legislative history of the AEDPA suggesting that Congress intended to change that by eliminating a critical appellate avenue of relief for all movants asserting statutory rights. Instead, it is plain that Congress intended the appealability requirement merely to eliminate *frivolous* appeals by federal prisoners, regardless whether they are based on statutory or constitutional rights — just as the certificate of probable cause requirement had eliminated frivolous appeals by state prisoners. See H.R. REP. NO. 23,

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[9] "[G]iven that federal criminal prosecutions involve far more federal non-constitutional law than do state prosecutions, in practice the inclusion of federal 'laws' is far more significant in the § 2255 setting." RICHARD H. FALLON, DANIEL J. MELTZER, DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1465 (4th ed. 1996).

supra, at 9 ("Since federal prisoners, like state prisoners, generate a high volume of meritless applications for collateral relief, it is appropriate to require that appeals of habeas corpus petitions meet a threshold probable cause standard before such an appeal will be heard by an appellate panel.").

The Eighth Circuit's view that Section 2253(c) should be read otherwise, to make district court decisions final for even the most important federal statutory Section 2255 claims "would produce silly" — and shocking — "results." LARRY W. YACKLE, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 146-147 n.43 (Fall 1996). Persons who are wrongfully incarcerated absent any statutory authority, like Hohn, may remain in prison without appropriate relief. This type of claim has historically been given the utmost solicitude, and indeed has roots in the earliest decisions of this Court granting habeas corpus relief. See, *e.g.*, *Ex Parte Lange*, 85 U.S. at 178 (habeas corpus is appropriate remedy where convicting court issued a punishment that exceeded its statutory authority). There is simply no reason why Congress would have singled out such "statutory" claims for a special burden under the AEDPA. See *Apker*, 101 F.3d at 76 (Henley, J., concurring) ("it is doubtful Congress intended in its 1996 habeas revisions to bar appeals of claims that a conviction violates federal law").

C. The Courts of Appeals Are Deeply Divided Over Whether Section 2253(c) Permits Appeal of Meritorious Federal Statutory Claims

"There is a difference of opinion" among the federal courts of appeal on the question presented here: "whether § 2253(c), which provides that a certificate of appealability may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right,' modifies preexisting law, which defined the required showing as, a 'substantial showing of the

denial of [a] federal right.'" *Hunter* v. *Bailey*, 101 F.3d 1565, 1571 (11th Cir. 1996). "It is undecided" among the federal courts "whether Congress intended to change the standard, along with the name, for granting a certificate of appealability," thereby foreclosing appeals by persons who claim to be held in violation of federal statutory rights. *Santana*, 98 F.3d at 757.

The Ninth Circuit has concluded that the prerequisite showing of a "denial of a constitutional right" in Section 2253(c) is "more demanding" than the "federal right" standard this Court set forth in *Barefoot*. *Williams* v. *Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). In contrast, the Second, Fifth, and Tenth Circuits have concluded that Congress intended to codify, and did not alter, the *Barefoot* "federal right" standard. See *Drinkard* v. *Johnson*, 97 F.3d 752, 756 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997); *Reyes* v. *Keane*, 90 F.3d 676, 679-680 (2d Cir. 1996); *Lennox* v. *Evans*, 87 F.3d 431, 434 (10th Cir. 1996), cert. denied, 117 S. Ct. 746 (1997). Each of those circuits, however, appears to interpret that standard as foreclosing appeals of statutory claims. See *Drinkard*, 97 F.3d at 756; *Reyes*, 90 F.3d at 679-680; *Lennox*, 87 F.3d at 434. The Third Circuit has suggested an entirely different interpretation, directly at odds with the Eighth Circuit's decision in *Hohn*: that Congress' use of the term "constitutional right" is attributable to "imperfect draftsmanship," and that Section 2253(c) may properly be read to *permit* appeals of statutory claims. *Santana*, 98 F.3d at 757.

The Eighth Circuit's decision that the new "constitutional right" standard forecloses Hohn's claim that he is incarcerated for "using" a firearm in a manner this Court held in *Bailey* does not violate Section 924(c), also directly conflicts with *three* decisions by the Tenth Circuit granting certificates of appealability under Section 2253(c) to hear virtually identical post-*Bailey* claims. In each case, the Tenth Circuit granted a certificate to decide an appeal of a federal

prisoner's claim that he was incarcerated for conduct this Court had determined in *Bailey* not to constitute "using" a firearm within the meaning of 18 U.S.C. § 924(c). See *United States* v. *Gorecki*, No. 96-4092, 1997 WL 74 (10th Cir. Apr. 1, 1997), pet. for cert. filed (Apr. 18, 1997) (No. 96-8702); *United States* v. *David*, No. 96-1391, 1997 WL 26581 (10th Cir. Jan. 24, 1997); *United States* v. *Deases*, No. 96-3152, 1996 WL 557661 (10th Cir. Oct. 1, 1996), cert. denied, 117 S. Ct. 746 (1997)). Like the Eighth Circuit, the Tenth Circuit interprets Section 2253(c) as requiring "a colorable showing of [a] *constitutional* error." *Lennox*, 87 F.3d at 434 (emphasis added). The Tenth Circuit's decisions in *Gorecki*, *David*, and *Deases* make clear, however, that it rejects the Eighth Circuit's view that a claim of incarceration for "using" a firearm in a manner this Court held in *Bailey* to be lawful is not a substantial claim of "constitutional" error.[10]

The Eighth Circuit's crabbed view of the protections of the Due Process Clause also conflicts with decisions in the Seventh and Second Circuits, recognizing (in reliance on this Court's decision in *Davis* v. *United States*, *supra*) that a prisoner's claim that he is incarcerated for lawful conduct asserts a denial of the constitutional right to due process. See *Johnson*, 805 F.2d at 1288; *Loschiavo*, 531 F.2d at 666; see also *Apker*, 101 F.3d at 76 (Henley, J., concurring).[11]

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[10] It is evident from the fact that the Tenth Circuit has repeatedly interpreted Section 2253(c) to authorize certificates of appealability to hear such claims that this is the law of the Circuit, notwithstanding that the decisions are unpublished. This Court recently granted certiorari to resolve a conflict presented in part by an unpublished decision of a court of appeals denying a certificate of probable cause (the predecessor of the certificate of appealability) in a habeas challenge. See *Lynce* v. *Mathis*, 117 S. Ct. 891, 893 (1997).

[11] Notably, the decision below has stimulated substantial controversy even within the Eighth Circuit itself on the question of the standards for appealability of habeas claims. Judges Beam, Loken, Hansen and McMillian all voted to grant Hohn's petition for en banc review. And in *Apker*, a case presenting a post-*Bailey* challenge identical to Hohn's, Judge Henley wrote separately to criticize the majority decision in *Hohn*.

II. THE EIGHTH CIRCUIT'S NOVEL WAIVER DOCTRINE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS INCOMPATIBLE WITH THIS COURT'S PROCEDURAL DEFAULT CASES

If the Court grants review to address the Eighth Circuit's construction of the AEDPA, it should also decide whether a Section 2255 movant's procedural default — failure to raise on direct appeal a legal challenge that at the time was squarely foreclosed by binding circuit precedent and had been uniformly rejected in other circuits — can be excused because of an intervening change in controlling precedent, which establishes that the underlying conduct does not constitute a crime. This Court's decisions establish that such procedurally defaulted claims may be raised in collateral review proceedings if the claimant establishes "cause and prejudice" or "actual innocence." In denying Hohn's Section 2255 motion, however, the district court made no mention of the cause-and-prejudice standard but instead applied a broad, categorical waiver rule announced by the Eighth Circuit in *United States* v. *McKinney*, 79 F.3d 105, pet. for cert. filed (U.S. Oct. 11, 1996) (No. 96-6348). Pet. App. 8a-9a.[12] Under the *McKinney* standard, a defendant can be deemed to have knowingly and intelligently "waived" a claim by failing to anticipate an unforeseeable change in binding circuit precedent. As we explain below, the Eighth Circuit's waiver rule is at odds with the decisions of other circuits and is patently inconsistent with the jurisprudence of this Court. Further review of this important issue of federal law is warranted.[13]

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[12] The magistrate judge who initially reviewed Hohn's Section 2255 motion noted that Hohn had not raised a *Bailey* claim on direct appeal but found that the cause-and-prejudice standard for procedurally defaulted claims was satisfied. Pet. App. 11a-12a. "Because *Bailey* was not decided at the time of the direct appeal," the magistrate judge explained, "there is adequate cause for defendant's failure to raise it"; furthermore, Hohn had established prejudice because his case appeared to fall "within the purview of *Bailey*." *Id.* at 12a.

[13] The court of appeals in this case did not reach the question of procedural default because it concluded that it was without jurisdiction to hear Hohn's appeal under the AEDPA. But because the district court denied Hohn's Section 2255 petition solely on the strength of the Eighth Circuit's waiver rule, and because Hohn presented the waiver argument to the court of appeals (see Pet. for Reh'g, at 5-7, 13-15), it is properly before this Court for decision. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (Court may review a question if it was "pressed or passed upon" in the court below).

A. The Eighth Circuit's Decision Conflicts With The Approach of Other Circuits

McKinney involved a defendant who had been convicted under 18 U.S.C. § 924(c) for "using" a firearm. After McKinney's trial and the filing of his opening brief on direct appeal, this Court decided *Bailey*. On the basis of these events, a panel of the Eighth Circuit held (in two sentences and without citation) that McKinney's failure to raise the *Bailey* argument at trial or in his initial appeal brief amounted to a "waive[r]" of the argument. *McKinney*, 79 F.3d at 109. Judge Heaney dissented, pointing out that "it would have been useless for McKinney to challenge the correctness of [the Eighth Circuit's] previous cases" before *Bailey* was decided. *Id.* at 109 (Heaney, J., dissenting). He added that "a waiver must be knowing and intentional" (*ibid.*) and that those requirements could not be satisfied when the "waived" argument was not available because this Court's decision had not yet been issued. The Eighth Circuit declined to rehear the case en banc, although five judges voted to do so. *Id.* at 105 n.*. In *Bousley* v. *Brooks*, 97 F.3d at 287-288, the Eighth Circuit applied the *McKinney* rule to a Section 2255 petitioner raising a *Bailey* claim.

The Eighth Circuit's waiver doctrine clearly conflicts with decisions of the Sixth, Seventh, and Tenth Circuits. *Mizen* v. *United States*, No. 96-3478, 1997 WL 117037, at **1 (6th Cir. Mar. 13, 1997); *Lee* v. *United States*, ___ F.3d ___, No. 96-3323, 1997 WL 213972, *2-*3 (7th Cir. Apr. 30, 1997); *United States* v. *Barnhardt*, 93 F.3d 706, 708-709 (10th Cir. 1996). The conflict is sharpest with *Barnhardt*, which held that a Section 2255 petitioner who failed to raise a *Bailey* argument (because he entered a guilty plea) was not precluded from

mounting a collateral attack on his Section 924(c) conviction. *Barnhardt*, 93 F.3d at 708-709. In *Bousley*, the Eighth Circuit, relying on the waiver doctrine announced in *McKinney*, expressly "declined to follow" *Barnhardt*'s holding. 97 F.3d at 288 n.4.

The rule of *McKinney* is also at odds with post-*Bailey* decisions of the Sixth and Seventh Circuits in cases involving collateral challenges to Section 924(c) convictions. In *Lee*, the Seventh Circuit, like the Tenth, rejected the government's argument that a defendant's guilty plea "conclusively establishe[d] the elements of the offense and the material facts necessary to support the conviction, foreclosing any challenge to the conviction." 1997 WL 213972, *2, (internal quotation marks omitted). The Seventh Circuit reasoned that, although the facts admitted in the guilty plea "at that time were thought to constitute a crime under § 924(c)," *Bailey* later held that those facts (amounting to simple possession of a gun) "do[] not a § 924(c) crime make." *Ibid.* The concept of waiver, the Seventh Circuit explained, was simply inapposite under these circumstances:

> [H]ow can Lee be held to have waived his right to challenge whether those facts constituted a crime when at the time they did, and after *Bailey* they may not? He *could not possibly be viewed as having voluntarily waived* what turns out to be a *Bailey* challenge when *Bailey* did not exist at the time he pled guilty.

Ibid. (emphasis added). The court of appeals also noted that the same reasoning applies whether the facts (which are later determined not to constitute a crime) were "found by a jury or admitted by a defendant." *Id.* at *3.

Similarly, the Sixth Circuit in *Mizen*, 1997 WL 117037, permitted a Section 2255 petition to raise a *Bailey* challenge that had been procedurally defaulted. Applying well-established principles, the Sixth Circuit explained that the defendant's failure to raise the *Bailey* issue on direct appeal required him to "demonstrate cause and actual prejudice to excuse his failure to

do so." 1997 WL 117037, at *1. The court then went on to hold that cause was established because "Mizen's § 924(c) [*Bailey*] claim relies on a significant, intervening change in the law." *Ibid.* The court also found prejudice because the evidence appeared insufficient to satisfy the *Bailey* standard. *Ibid.*

In cases raising similar claims following this Court's decision in *McNally*, the courts of appeals recognized that cause existed for failing to raise an issue that was not viable before an intervening decision of this Court changed the interpretation of the underlying statute. See, *e.g.*, *Callanan* v. *United States*, 881 F.2d 229, 231 (6th Cir. 1989) ("the fact that the point appeared to be settled constituted cause for not raising it"); *United States* v. *Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988) (*McNally* "presents the quintessential circumstance in which a defaulted claim had so little basis in existing law that a habeas petitioner had cause for failing to raise it"). Although other circuits have not directly decided the question in post-*Bailey* claims, no court of appeals has shown any predisposition to agree with the Eighth Circuit.[14] As we next explain, the Eighth Circuit's waiver rule is also in severe tension with established law concerning the cause-and-prejudice standard and the exception.

B. The Eighth Circuit's Waiver Rule Creates An End Run Around The Established Framework For Deciding Whether Collateral Relief Is Available for Procedurally Defaulted Claims

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[14] The Third, Fourth, and Ninth Circuits have all heard appeals (on other grounds) from district court orders that vacated convictions or guilty pleas after *Bailey*; not one of those courts suggested that waiver or procedural default posed any barrier to collateral relief based on *Bailey*. See, *e.g.*, *United States* v. *Davis*, ___ F.3d ___, No. 96-1721, 1997 WL 195397, *1 (3d Cir. Apr. 23, 1997); *United States* v. *Hillary*, 106 F.3d 1170, 1170-1171 (4th Cir. 1997); *United States* v. *Handa*, 110 F.3d 42, 43 (9th Cir. 1997). Two other circuits, the First and Fifth, have expressly reserved the question whether *Bailey* can be invoked in collateral challenges, but neither court suggested any inclination to agree with the Eighth Circuit's lonely view. See *United States* v. *Joseph*, 109 F.3d 34, 36 (1st Cir. 1997); *United States* v. *Rocha*, 109 F.3d 225, 229 n.5 (5th Cir. 1997); see also *United States* v. *Andrade*, 83 F.3d 729, 730 n.1 (5th Cir. 1996).

The Eighth Circuit's waiver rule is also incompatible with this Court's cases dealing with the "cause-and-prejudice" test for excusing procedural defaults. Under established principles, a prisoner who seeks collateral relief on a ground not raised at trial or on direct appeal from conviction is said to have suffered a "procedural default." See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 168 (1982). But procedural default does not necessarily preclude collateral relief on the defaulted theory. This Court has established two exceptions that allow collateral review in spite of a procedural default: where the prisoner (1) can "demonstrate cause for the default and actual prejudice as a result" of the underlying error, or (2) can show "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991); see also *Frady*, 456 U.S. at 167-168. Although Hohn satisfies both exceptions and thus is entitled to relief on his procedurally defaulted *Bailey* claim, the Eighth Circuit's waiver rule denies him the benefit of these exceptions.

1. *Cause and Prejudice*. To demonstrate "cause, a claimaint must show "the existence of * * * some objective factor external to the defense [which] impeded counsel[]" and effectively prevented the defendant from raising the argument during trial. *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986). The fact that an argument is precluded by binding precedent (and is sufficiently novel that it appears frivolous) is just such an objective, external factor that excuses counsel's failure to raise the issue.[15]

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[15] As we show below (see Section III), Hohn was obviously prejudiced by the trial court's error because he was convicted under § 924(c) for conduct that does not constitute a crime after *Bailey*. See *Callanan*, 881 F.2d at 231 ("[t]he prejudice requirement boils down to a question of whether the Callanans could properly have been convicted" under the proper standard); *Dalton* v. *United States*, 862 F.2d 1307, 1310 (8th Cir. 1988) (prejudice requires showing that prisoner "was convicted for conduct that is not proscribed by the [relevant] statute").

This Court has specifically held that where a claim "is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Reed* v. *Ross*, 468 U.S. 1, 16 (1984). In *Reed*, the Court categorized the kinds of novel claims that might establish cause, identifying two categories that "[b]y definition" demonstrate cause because there was no reasonable basis for raising the claim earlier:

> First, a decision of this Court may explicitly overrule one of [its own] precedents. Second, a decision may overturn a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

Id. at 17 (internal citations and quotation marks omitted). The *Bailey* argument, on which Hohn here relies, falls squarely within the second category. In 1992, when Hohn was tried and convicted under Section 924(c), the Eighth Circuit (like every other circuit) had construed the term "use" quite broadly (and erroneously, as it turned out). Hohn's trial counsel cannot be faulted for lacking the prescience to believe that a decision of this Court some three years after his conviction would fundamentally alter the landscape of Section 924(c)(1).

The Sixth Circuit, like the magistrate judge in this case (Pet. App. 12a), has recognized that *Bailey*'s substantial change in the substantive interpretation of Section 924(c)(1) constitutes cause. *Mizen*, 1997 WL 117037, at **1 ("Mizen's § 924(c) [*Bailey*] claim relies on a significant, intervening change in the law"). Moreover, the courts of appeals recognized that this Court's decision in *McNally* — a case that, like *Bailey*, narrowed the scope of a criminal statute — provided cause for failing to raise the identical issue on direct appeal. See, *e.g.*,

Callanan, 881 F.2d at 231; *Shelton*, 848 F.2d at 1490.[16] Where cause and prejudice exist, as they do here, procedural default is excused.

2. *Miscarriage of Justice*. This Court has permitted the assertion of procedurally defaulted claims in order to avoid a "miscarriage of justice" or where a claim asserts "actual innocence." *Sawyer* v. *Whitley*, 505 U.S. 333, 339 (1992).[17] In a collateral review case involving a similar claim, this Court has noted that "conviction and punishment [] for an act that the law does not make criminal * * * inherently results in a complete miscarriage of justice * * * ." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted).[18] The courts of appeals have likewise recognized that a claim such as Hohn's -- pointing to a later decision of this Court that demonstrates the prisoner has been convicted for conduct that is not criminal -- shows that there has been a miscarriage of justice and obviates any need to show cause for the default. See, *e.g.*, *Shelton*, 848 F.2d at 1490 n.4 (recognizing "a compelling argument [that a *McNally* claim is available on collateral review] without regard for whether the petitioner had cause for any default"); *Callanan*, 881 F.2d at 231 ("There is a strong argument * * * that cause need not be shown at all in these unusual circumstances.") (citing *Shelton*); see

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[16] In *Dalton*, the Eighth Circuit correctly applied the cause-and-prejudice test in holding that a defendant challenging his conviction for mail fraud after *McNally* was not precluded from obtaining relief because of procedural default. See *Dalton*, 862 F.2d at 1310 (stating that "a petitioner for post-conviction relief has cause * * * for failing to raise a claim 'for which there was no reasonable basis in existing law'") (quoting *Reed*, 468 U.S. at 15). The Court in *McKinney* did not cite or distinguish *Dalton*. In this case, the Eighth Circuit was asked to grant rehearing en banc in part to resolve the tension between *Dalton* and *McKinney*, but declined to do so.

[17] Although *Sawyer* addressed the "miscarriage of justice" exception in the context of successive claims, the Court noted that the same standard also applies to allow consideration of the merits of procedurally defaulted claims. *Ibid.* (citing *Murray*, 477 U.S. at 496).

[18] *Davis* itself did not involve a procedural default, but the Court there expressed unshakeable certainty ("[t]here can be no room for doubt," *ibid.*) that conviction for conduct that is not a crime constitutes a miscarriage of justice.

also *United States* v. *McKie*, 73 F.3d 1149, 1154 (D.C. Cir. 1996) (remanding to determine whether § 2254 movant was actually innocent under new interpretation of criminal statute); *United States* v. *Sood*, 969 F.2d 774, 776 (9th Cir. 1992) ("The doors of collateral review are open for petitioners who can show, through an intervening change in the law, that they could not have committed the substantive offense with which they were charged," reviewing cases applying *McNally*). Because Hohn is actually innocent of the crime defined by Section 924(c), the actual innocence exception should excuse his procedural default. See also Section III, *infra*.[19]

The Eighth Circuit's waiver doctrine eviscerates these well-established exceptions to procedural default and denies Hohn the opportunity for collateral review that he is properly entitled to.

C. The Issue Is Important And The Eighth Circuit's Analysis Is Seriously Flawed

The Eighth Circuit's novel waiver rule raises an important issue of federal law that warrants this Court's attention. At the same time, the Eighth Circuit's rule is erroneous and in need of correction by this Court. For those reasons as well, review should be granted.

The Eighth Circuit's waiver doctrine is important for at least four reasons. First, it arises with great regularity. Second, it threatens to undermine the scheme that this Court has established for evaluating procedural defaults. Third, the Eighth Circuit's waiver rule leads to

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[19] We note, moreover, that many cases decided in the wake of *McNally* and *Bailey* have recognized, without engaging in a specific analysis of cause or actual innocence, that an intervening change in the interpretation of the underlying criminal statute is a proper ground for collateral relief. See, *e.g.*, *Lee*, 1997 WL 213972, at *2-*3; *Barnhardt*, 93 F.3d at 709; *Ingber* v. *Enzor*, 841 F.2d 450, 454 (2d Cir. 1988) ("retroactive application [of *McNally*] is necessary to avoid an unfair result"); *Magnuson* v. *United States*, 861 F.2d 166, 167 (7th Cir. 1988).

untenable results, permitting federal prisoners to languish in federal prisons for conduct that this Court has held is not criminal. And fourth, the Eighth Circuit's rule would effectively require defendants to raise claims that are admittedly frivolous, merely to preserve arguments for collateral review in the hope that the substantive law might later be interpreted more narrowly. Besides the sheer impossibility of that task, such a requirement would multiply the number of frivolous issues in criminal cases, needlessly burdening the limited resources of federal courts and serving no useful purpose. This Court has (without dissent) rejected a requirement that a defendant "make a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson* v. *United States*, No. 96-203, slip op. 6-7 (U.S. May 12, 1997). Indeed, such a requirement would directly conflict with counsel's obligation *not* to advance frivolous arguments before the court. See, *e.g.*, *United States* v. *Gomez*, 24 F.3d 924, 926 (7th Cir. 1994).

The Eighth Circuit's waiver rule is also egregiously incorrect. As Judge Heaney correctly noted, "a waiver must be knowing and intentional." *McKinney*, 79 F.3d at 109 (Heaney, J., dissenting). A defendant who does not know (and cannot reasonably predict) that this Court will issue a ground-breaking decision three years after his conviction cannot be said to have waived an argument that was foreclosed before that decision. The Seventh Circuit has made much the same point, recognizing that a defendant "could not possibly be viewed as having *voluntarily* waived" an argument that "did not exist at the time he pled guilty." *Lee*, 1997 WL 213972, at *2 (emphasis added). Similarly, the Ninth Circuit pointed out that a pre-*Bailey* guilty plea was not "knowing and voluntary" in the light of *Bailey* because "the facts [the defendant] admitted committing do not now constitute a crime." *United States* v. *McJoy*, No.

95-15565, 1996 WL 528422, **1 (9th Cir. Sept. 13, 1996); see also *id.* at **2 (noting "fundamental unfairness of allowing the government to keep the benefit of a bargain McJoy did not contemplate").

III. THE PROPER DEFINITION OF THE CRIME OF "CARR[YING] A FIREARM" UNDER 18 U.S.C. § 924(C) IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT

If this Court concludes that review should be granted on the first two questions presented, then it should also grant review to address the government's contention below (replayed in countless post-*Bailey* cases across the country) that petitioner's conviction under 18 U.S.C. § 924(c) can be sustained because he "carrie[d] a firearm." As we explain below, the proper scope of "carrying" liability under Section 924(c) is a critically important question of federal law as to which the courts of appeals are in disarray. Although the lower courts did not reach the "carry" issue, it was properly raised below and is therefore presented for decision. See note 12, *supra*. Moreover, resolution of the issue is not dependent upon any factual findings but rather on an analysis of the text, structure, and legislative history of the statute as well as on very limited materials from the record (such as the jury instructions and limited portions of the trial testimony).[20] As we explain below, the government completely failed to prove that petitioner "carried" a firearm, much less that he carried it "during" the predicate offense. And,

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[20] The government acknowledged in the district court that petitioner's challenge to his Section 924(c) conviction raises "an issue of law" that "can be resolved on the basis of the record and files before the Court." Pet. App. 15a.

at a minimum, petitioner is entitled to a new trial because the jury instructions plainly misstated the proper scope of "carrying" liability.[21]

A. The Scope of "Carrying" Liability Is An Important And Recurring Issue

Section 924(c) is one of the most frequently deployed criminal provisions in the federal prosecutor's arsenal. According to data collected by the U.S. Sentencing Commission, in the fiscal year ending September 30, 1995 alone, 1,973 defendants were sentenced for violations of Section 924(c)(1). MURRAY, *Mandatory 5-year Sentence for Gun Use Curbed By Court*, Wash. Times, Dec. 7, 1995, at A6. Moreover, since this Court's decision in *Bailey*, which worked a substantial narrowing of the scope of "use" liability under Section 924(c), the federal courts increasingly have been called upon to determine the nature of alternative liability under Section 924(c) for "carr[ying] a firearm." See *United States* v. *Cooke*, No. 96-1852, 1997 U.S. App. LEXIS 6645, at *16 n.7 (7th Cir. April 9, 1997) ("[N]ow that the *Bailey* decision has dramatically constricted the range of conduct constituting 'use' of a firearm, delineation of the parameters of the term 'carries' takes on heightened significance"). In the year and a half since *Bailey* was decided, there have been literally hundreds of reported decisions by the district courts and courts of appeals discussing this subject. Not surprisingly, the Solicitor General has acknowledged that Section 924(c) "is an important and widely used statute." No. 95-1605 Petition for Certiorari, *United States* v. *Gonzales*, at 7. The scope of criminal liability under

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[21] Because one of the two alternative theories of Section 924(c) liability has (as the government concedes) been rendered legally invalid by *Bailey*, Hohn is entitled to have the verdict set aside. As the Eighth Circuit has explained, "a verdict based on jury instructions that provided alternative bases for a finding, one of which is legally inadequate, is presumed to have rested on the insufficient basis." *United States* v. *Ryan*, 41 F.3d 361, 365 (1994) (citing *Griffin* v. *United States*, 502 U.S. 46 (1991)). The jury in this case was not asked to specify on the verdict form whether Hohn "used" or "carried" a firearm. It is therefore impossible to determine from the record on which ground the jury based the conviction (*Stromberg* v. *California*, 283 U.S. 359, 368 (1931)), and the verdict must be set aside if either ground is improper.

Section 924(c) is especially important, moreover, because of the severe penalties that Congress has attached to it.

B. The Courts Of Appeal Are In Disarray Over What It Means To "Carry" A Firearm And Would Benefit From Guidance From This Court

As the Seventh Circuit recently noted, "[t]he circuits are split" in cases involving firearms found in vehicles over what it means to "carry" a firearm under Section 924(c). *Cooke*, 1997 U.S. App. LEXIS 6645, at *25. There is a sharp conflict over "whether a weapon that is aboard * * * must be immediately accessible to the defendant in order to suppport a 'carrying' conviction." *Ibid.* Accord *United States* v. *Cleveland*, 106 F.3d 1056, 1065, 1066-68 (1st Cir. 1997) (noting 4-3 circuit split on this issue), pet. for cert. filed, Apr. 30, 1997 (No. 96-8837).[22] The First, Fourth, and Tenth Circuits have all held that "a gun may be 'carried' in a vehicle for purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." *Cleveland*, 106 F.3d at 1066; see *United States* v. *Miller*, 84 F.3d 1244, 1259 (10th Cir.), cert. denied, 117 S. Ct. 443 (1996); *United States* v. *Mitchell*, 104 F.3d 649, 653-54 (4th Cir. 1997). In contrast, the Second, Sixth and Ninth Circuits have held that a gun may be carried in a vehicle only if it is immediately accessible to the defendant. See *United States* v. *Giraldo*, 80 F.3d 667, 677-78 (2d Cir.), cert. denied, 117 S. Ct. 135 (1996); *United States* v. *Riasco-Suarez*, 73 F.3d 616, 623 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996); *United States* v. *Staples*, 85 F.3d 461, 464 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996). The dissenting judges in the D.C. Circuit's *en banc* court in *Bailey*, whose interpretation of "use" was adopted by this Court, were of the view that "carry" does *not* extend

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[22] See also No. 96-8837 Petition for Certiorari, *Cleveland* v. *United States*, at 7-17 (describing conflict); No. 96-1654 Petition for Certiorari, *Muscarello* v. *United States*, at 6-11 (filed April 18, 1997) (same).

to cases where a firearm that is not immediately accessible to the defendant is transported in a vehicle. See 36 F.3d 106, 125 (D.C. Cir. 1994) (Williams, joined by Silberman & Buckley, JJ., dissenting) ("The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon * * * , 18 U.S.C. § 924(b), that seems an improbable duplication."), rev'd, 116 S. Ct. 501 (1995). At least one commentator has noted this "split among the circuit courts." KESSELMAN, *Firearm Possession: Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. 924(c)(1) in Bailey v. United States*, 30 CREIGHTON L. REV. 513, 540 (1997). Thus the courts of appeal are sharply divided on the question whether *immediate accessibility* is a *necessary* prerequisite to "carrying."

Although the circuits are hopelessly confused over the meaning of "carry" in vehicle cases, we are aware of no circuit decision since *Bailey* that has held that a defendant "carries a firearm" merely by having it nearby or accessible in a house, apartment or other stationary setting (*i.e.*, not in a moving vehicle). Two circuits have expressly concluded that "carrying" does not cover such a scenario. Thus, the Seventh Circuit in *Cooke* recently held that immediate accessibility to a firearm does *not* suffice to show "carrying" in a nonvehicle case (where the firearm is not transported). 1997 U.S. App. LEXIS 6645, at *22-*25 (7th Cir. April 9, 1997) (defendant's presence in passenger compartment of pickup truck at same time garment bag containing firearm was on truck's bed did not constitute "carrying," where "the truck never moved the weapon"); accord *United States* v. *Jackson*, 103 F.3d 561, 569 (7th Cir. 1996). Similarly, the Sixth Circuit vacated a Section 924(c) where the defendant had been apprehended

while sleeping in his bedroom (with four guns "strewn about the bedroom"). *United States* v. *Moore*, 76 F.2d 111, 113 (6th Cir. 1996). The Sixth Circuit explained that "[i]mmediate availability is * * * a necessary, *but not sufficient*, determinant" of liability for carrying, and noted that "if Congress had meant Section 924(c)(1) to implicate any individual who happens to be within arm's reach of a firearm, surely it would have selected a more accurate term than 'carry.'" *Ibid.* (emphasis added).[23] Nevertheless, at least one district court has accepted this untenably broad definition of "carry," see also *United States* v. *Canady*, 920 F. Supp. 402, 405-408 (W.D.N.Y. 1996), and the government can be counted on to press that theory in other cases. Under these circumstances, further guidance from this Court would be tremendously valuable to the lower courts.

C. The Government Failed To Prove That Petitioner "Use[d] or Carrie[d] A Firearm"

As we explain below, there was no evidence — none — that Hohn ever "used" a firearm as that term was explained in *Bailey* v. *United States*, 116 S. Ct. 501 (1995). Nor did the government offer any evidence that would prove that Hohn "carried" the weapon "during and in relation" to the predicate offense.

1. *"Use" Liability*. The evidence supporting Hohn's § 924(c) conviction was succinctly summarized by Judge McMillian in his dissent from the panel opinion. He explained that police found firearms in the kitchen and bedroom, but not in the living room, where Hohn was arrested. Pet. App. 3a (McMillian, J., dissenting). At trial, a government witness, Cindy

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[23] The handful of pre-*Bailey* decisions that endorsed such an expansive concept of "carrying" (see *United States* v. *Evans*, 888 F.2d 891, 895 (D.C. Cir. 1989), cert. denied, 494 U.S. 1019 (1990); *United States* v. *Anderson*, 881 F.2d 1128, 1140-41 (D.C. Cir. 1989); *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985)) have been effectively overruled by this Court's rejection, in *Bailey*, of the government's "possession for protection" theory of "use."

Vandry, testified that she had twice purchased methamphetamine from Hohn in his house. *Ibid.* She admitted that on those occasions she had observed "the rifles in the gun case but no handguns." *Id.* at 5a. Testifying in his own defense, Hohn "admitted possession of some of the methamphetamine, admitted he owned the firearms as an avid gunsmith and hunter, [and] disputed the police version of the location of some of the firearms * * * ." *Id.* at 3a.

In *Bailey*, this Court held that, to "use" a firearm within the meaning of Section 924(c), a person must "active[ly] employ[]" it by "brandishing, displaying, bartering, striking with, * * * firing or attempting to fire" the weapon. 116 S. Ct. at 508-509. In so holding, the Court rejected the government's argument that mere possession of a firearm for intended or potential use during a predicate offense qualifies as "use." In this case, there was simply no evidence that Hohn brandished, displayed, fired, pointed, or otherwise actively employed any of the firearms found in his home "during and in relation to" the predicate offense of possession of methamphetamine with intent to distribute it. Indeed, in opposition to Hohn's 2255 motion, the government did not argue that there was any evidence that Hohn "used" the firearms found in his home. Instead, it argued that there was sufficient evidence that Hohn *carried* a firearm. In short, the government failed completely to prove that Hohn committed the crime of "us[ing]" a firearm under Section 924(c).[24]

2. *"Carrying" Liability*. The government also failed to prove that Hohn "carrie[d]" a firearm. As we explain below, the text, structure, and legislative history of Section 924(c) all demonstrate that the crime of "carrying" a firearm occurs only when a defendant *has or bears*

[24] The government conceded, moreover, that the jury instruction on "use" was erroneous under *Bailey*. Pet. App. 16a. It further "agree[d] that it would be *plain error* had the instructions only given the jury the option of convicting the defendant under the 'use' prong of 18 U.S.C. 924(c), and the evidence only supported that option." Pet. App. 17a (emphasis added).

a weapon on his person. There is no evidence in this case, however, that Hohn "carried" any of the firearms found in his home, and certainly no evidence that he carried them "during" as well as "in relation to" the predicate possessory offense of possession of methamphetamine with intent to distribute it. The government accordingly failed to prove the crime of "carrying" a firearm in a predicate offense under Section 924(c) beyond a reasonable doubt, and Hohn is entitled to be have his sentence vacated.

As this Court has explained, the operative language of Section 924(c) "must be given its 'ordinary or natural' meaning." *Bailey*, 116 S. Ct. at 506 (quoting *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993)). The ordinary meaning of the word "carry" — especially when used in conjunction with the direct object "firearm" or "weapon" — is to *have or bear on one's person*. This meaning is amply confirmed by standard dictionaries. See, *e.g.*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 233 (1988) (defining "carry" as "[t]o have or keep on one's person (*carry a gun*)") (emphasis altered); BLACK'S LAW DICTIONARY 194 (5th ed. 1981) (defining "carry" as "[t]o have or bear upon one's person, as a watch or weapon; locomotion not being essential."); *ibid.* (defining "carry arms or weapon" as "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person."). Accord *Cleveland*, 106 F.3d at 1067 (acknowledging that the *"Black's* definition of 'carry arms or weapons' limits 'carrying' to the defendant's person" but declining to adopt that definition). Ordinary experience confirms that to carry a firearm mean to have or bear it on one's person. If asked the question, "Are you carrying a firearm?", an ordinary speaker of the English language would not answer "yes" unless he had a firearm on his person.

The government's answer to Hohn's Section 2255 petition in the district court suggests that it too understands the phrase "carries a firearm" according to its ordinary meaning. The government there argued:

> Evidence was presented to the jury that Hohn carried a firearm. * * * It is true that Hohn *did not have a firearm on his person* when the Omaha Police * * * execut[ed] [the] search warrant. However, a reasonable inference can be drawn from the evidence that Hohn was carrying a firearm *prior* to the officers' entry based upon the items that were located, i.e., drugs, guns and ammunition, and where they were located. * * * The .380 caliber semi-automatic pistol and the Colt revolver found on the kitchen counter within arms reach of the methamphetamine, packaged for redistribution, were found in holsters. The obvious inference to be drawn from this evidence is that Hohn, at some time prior to the execution of the search warrant, *entered his residence and placed his belongings, which included the methamphetamine and firearms*, onto the counter. Therefore, at some point prior to the execution of the search warrant, he obviously *carried the firearms* during his drug trafficking activities.

Pet. App. 17a-19a (emphasis added). As the highlighted language makes clear, even the government understands that to "carry a firearm" is to bear it upon one's person.

The ordinary meaning of the phrase "carries a firearm" is further confirmed by the structure and legislative history of Section 924. Section 924(a)(5)(B)(ii) penalizes the sale, delivery, or other transfer of a handgun or ammunition by an adult to a juvenile if the adult knows or has reasonable cause to know that the juvenile "intended to *carry or otherwise possess* or *discharge or otherwise use* the handgun or ammunition in the commission of a crime of violence." 18 U.S.C. § 924(a)(5)(B)(ii) (emphasis added). This provision reflects Congress's understanding of "carrying" as a specific kind of possession (bearing on one's person). In addition, Section 924(b) makes it a separate crime to "transport" a firearm with the knowledge or "intent to commit therewith an offense punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(b). Thus Congress plainly knows how to reach situations where a firearm is caused to be moved by a defendant in a vehicle. Had Congress thought such conduct

was already encompassed within "carrying" liability, there would have been no need to enact Section 924(b).

What is more, every reference to "carrying" a firearm in the legislative history of Section 924(c) of which we are aware is fully consistent with the ordinary meaning of that term. See, *e.g.*, S. Rep. No. 225, at 314 n.10, 1984 U.S.C.C.A.N. at 3492 n.10 ("Evidence that the defendant had a gun *in his pocket* but did not display it, or refer to it, could nevertheless *support a conviction for "carrying"* a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.") (citation omitted) (emphasis added).

Moreover, this Court's unanimous decision in *Bailey* strongly confirms that "carrying" a firearm encompasses only bearing the weapon on one's person. Tellingly, the Court in *Bailey* said: "Under the interpretation we enunciate today, a firearm can be used *without being carried*, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm *without handling it*; and a firearm can be carried without being used, *e.g.*, when an offender *keeps a gun hidden in his clothing* throughout a drug transaction." *Bailey*, 116 S. Ct. at 507 (emphasis added). As the highlighted language makes clear, this Court in *Bailey* had in mind the ordinary meaning of "carrying"; and the opinion's clear intimation that a firearm that is bartered for drugs would not be carried *if it is not handled*, confirms that having a firearm in one's hands or one's person is a necessary precondition to carrying it. Also significant is this Court's rejection in *Bailey* of the government's contention that there could be liability under Section 924(c) merely by virtue of a defendant's "placement of a firearm to provide a sense of security or to embolden." 116 S. Ct. at 508. The Court explained:

> It follows, according to this argument, that a gun placed in a closet is "used," because its mere presence emboldens or protects its owner. We disagree. Under this argument, *mere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is a "use"* by the offender, because its availability for intimidation, attack, or defense would always, presumably, embolden or comfort the offender. But the mere inert presence of a firearm, without more, is not enough to trigger § 924(c)(1). Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a fiream, without its more active employment, is not reasonably distinguishable from possession.

Ibid. (emphasis added). Although the foregoing discussion was directed at "use" liability, there is no reason why a similarly broad reading of "carrying" liability — to include mere possession of a firearm in proximity to drugs — would "be reasonably distinguishable from possession" either.

Finally, even if the Court were to conclude that the language, structure, and legislative history of Section 924(c)(1) do not compel the interpretation of "carry" suggested above, there can be no serious doubt that our interpretation is a reasonable one, and that the statute is therefore *at least* ambiguous on this score. Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). That principle is dispositive here.

In sum, the crime of "carrying" a firearm under Section 924(c) requires that a defendant bear the weapon on his person. There was no evidence in this case that Hohn "carried" the firearms in this sense, much less that he carried them "during" the predicate possessory offense. Although the government argued below that a fair inference of such conduct could have been drawn from the facts, that submission was simply incorrect. There was no evidence presented that Hohn ever carried the firearms located in his kitchen and in his bedroom drawers. In any

event, even if there were proof of carrying at some time by Hohn, there was no proof (much less proof beyond a reasonable doubt) that Hohn carried the firearms *during* the predicate offense. See *United States* v. *Harrison*, 103 F.3d 986, 990-92 (D.C. Cir. 1997). For all we know, any carrying that occurred could well have preceded Hohn's coming into possession of the methamphetamine he was charged with possessing with intent to distribute. If so, then Hohn plainly did not violate Section 924(c) — under any view of the evidence.

D. Because The Jury Instruction Grossly Misstated The Law, Petitioner Is Entitled, At A Minimum, To A New Trial

As previously explained, Hohn is entitled to have his conviction set aside on the Section 924(c) count because of this Court's decision in *Bailey*. But even if that were not the case, and the government had presented sufficient evidence from which the jury could conclude beyond a reasonable doubt that Hohn "carried" a firearm in violation of Section 924(c), he would be entitled to a new trial because of fundamental defects in the jury instructions. The jury was charged that

> [t]he phrase "used a firearm" means having a firearm *available to aid in the commission* of possession of Methamphetamine with intent to distribute. *Similarly*, the phrase "carried a firearm" *does not require proof of actual possession* of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was *available to provide protection* in connection with the possession of Methamphetamine with intent to distribute or facilitate success.

Pet. App. 31a (emphasis added). As previously noted (at note 23, *supra*), the government acknowledged that the part of the charge relating to firearm "use" was erroneous and would have qualified as "plain error" if use were the only basis for liability charged to the jury.

The jury's instruction on the meaning of "carrying" liability, however, suffers from the same flaw as the "use" instruction. Indeed, "use" and "carry" are defined in the Eighth

Circuit's model instruction in a virtually identical fashion: both permit a finding of liability based solely on whether the firearm is "available" to assist the defendant during the predicate act. That theory of liability, however, was categorically rejected by this Court in *Bailey*. See 116 S. Ct. at 508 (explaining that government's "possession for protection" theory "is not reasonably distinguishable from possession," which Section 924(c) does not reach). Nor does the Eighth Circuit's instruction for "carrying" even remotely resemble the ordinary meaning of that term, when used in conjunction with weapons. Hohn could easily have "carried" the firearms within the meaning of the Eighth Circuit's instruction without bearing them on his person, without transporting them within immediate reach in a vehicle, and even without transporting them in an inaccessible place in a vehicle.[25] Indeed, the jury instruction did not even require a finding that Hohn *posessed* the firearms for a finding of "carrying." At a minimum, petitioner is entitled to a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1997

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[25] The government's suggestion that the jury could properly have found that Hohn carried the firearms by bearing them on his person at some previous point in time (but still during his predicate possessory offense) is wrong not only because there was no evidence to support such a finding, but also because the jury instruction failed completely to present that issue for the jury's determination.

APPENDICES

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-3118

Arnold F. Hohn, *

Appellant, *

v. * Appeal from the United States District Court for the District of Nebraska.

United States of America, *

Appellee. * (PUBLISHED)

Submitted: September 13, 1996

Filed: November 4, 1996

Before McMILLIAN, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

The petitioner in this case, unsuccessful in his effort to have his sentence set aside under 28 U.S.C. § 2255, seeks review in this court. Petitioner's appeal, however, will not lie unless we issue him a certificate of appealability, and such a certificate is not available unless the petitioner makes a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2).

The petitioner complained to the district court that at his trial the jury instructions dealing with what it means to use a firearm under 18 U.S.C. § 924(c)(1) did not conform to the principles outlined in Bailey v. United States, 116 S. Ct. 501 (1995). It seems to us that under these circumstances a certificate cannot issue, because the petitioner is not making a

constitutional claim: He is making a claim to a federal statutory right. Bailey did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution. The Constitution does not guarantee that judges will always be right. It does guarantee, it is true, that persons accused of crimes will receive due process; but the petitioner makes no due process claim with respect to the trial judge's actions, and trial errors hardly ever rise to the level of a due process violation in any case.

United States v. Liguori, 438 F.2d 663 (2d Cir. 1971), on which Judge McMillian relies in his dissenting opinion, is not to the contrary. The predicate for that case was that the Supreme Court had on constitutional grounds invalidated certain statutory presumptions, see id. at 666-67, and the petitioners were claiming that the statute under which they were convicted was invalid because it contained an unconstitutional presumption. See id. at 665. There is no such claim here. The petitioner does not maintain that § 924(c)(1) is unconstitutional or that it was unconstitutionally applied to him. He maintains only that the statute was wrongly applied to him.

For the foregoing reasons, we deny the certificate.

McMILLIAN, Circuit Judge, dissenting.

Arnold F. Hohn appeals from the district court's dismissal with prejudice of his 28 U.S.C. § 2255 motion claiming the benefit of Bailey v. United States, 116 S. Ct. 501 (1995). Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amended 28 U.S.C. § 2253(c) to require a "substantial showing of the denial of a constitutional right" before a certificate of appealability may issue. The court denies Hohn a certificate. I must respectfully dissent.

Background

After a confidential informer told police Hohn was a high-level methamphetamine dealer, they investigated and obtained a no-knock warrant. When the police arrested Hohn in his living room, they found one gram of methamphetamine in his wallet. They also went to the kitchen where they found 15.8 grams of methamphetamine, three loaded pistols approximately one foot from the drug, and another firearm. In Hohn's bedroom the police found 3.1 grams of methamphetamine in a cigarette package and another loaded pistol approximately two feet from the package. Finally, in another bedroom they found drug paraphernalia and a gun case with shotguns and rifles. Cindy Vandry arrived at the house during execution of the warrant. She had twice purchased methamphetamine from Hohn at his home, and on those occasions she had observed "a substantial amount of currency in the bedroom."

The government charged Hohn with possession of methamphetamine with intent to distribute it, using and carrying fifteen firearms in relation to the methamphetamine offense, and being a felon in possession of firearms. He stood trial, admitted possession of some of the methamphetamine, admitted he owned the firearms as an avid gunsmith and hunter, disputed the police version of the location of some of the firearms, and testified he believed he could legally possess the firearms because his attorney had told him that his 1974 juvenile conviction for malicious destruction of property did not count as an adult felony.

At trial, counsel urged substitution of "for the purpose of" in place of "available to aid in the commission of" in the verdict director for the firearms "use" charge. The jury convicted Hohn on all counts. He did not raise the instructional issue in his pre-Bailey appeal. This court affirmed. United States v. Hohn, 8 F.3d 1301 (8th Cir. 1993).

In his § 2255 motion, Hohn argued: (1) his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by Bailey; a fundamental miscarriage of justice would result unless the court addressed the issue; (3) he should not be penalized for not raising the issue on direct appeal because he relied on years of Eighth Circuit precedent; (4) denial of a remedy would show "a lack of due process in the judicial system," quoting United States v. Loschiavo, 531 F.2d 659, 666 (2d Cir. 1976) (affirming vacation of conviction on change-in-law ground not raised on direct appeal), and (5) he was prejudiced by the jury instruction that said no affirmative firearms use was required but that availability of a firearm was adequate for a guilty verdict.

The government responded that Bailey did not aid Hohn because evidence supported a carrying conviction. It admitted the verdict directing instruction was erroneous under Bailey, and Hohn was not carrying a firearm when officers executed the warrant. It argued, however, that the kitchen firearms, "within arm's reach of the methamphetamine," were in holsters and supported the inference that at some time Hohn "entered his residence and placed his belongings, which included the methamphetamine and firearms onto the counter." The government concluded it was obvious Hohn had carried the firearms during his drug trafficking activities, and the instructional error was harmless.

In reply, Hohn argued that the instruction was error under Bailey, citing United States v. Webster, 84 F.3d 1056, 1060, 1065-66 (8th Cir. 1996) (permitting brief on Bailey after initial submission of direct appeal and reversing because plain error in pre-Bailey jury instruction permitted conviction for "mere presence and ready availability" of firearm where defendant admitted purchase of a firearm for his protection). He also urged that the government's methamphetamine-within-arm's-reach-of-firearms argument was insufficient under United States v. White, 81 F.3d 80,

83 (8th Cir. 1996) (affirming "carrying" conviction on direct appeal and saying government must prove that the defendant bore the firearm on or about his person during and in relation to a drug trafficking offenses), quoting Bailey's language, "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." 116 S. Ct. at 508 (discussing different meanings of "use" - active employment, storage, placement for active use). He included a copy of Cynthia Vandry's testimony that she saw the rifles in the gun case but no handguns when she was at Mohn's house.

The district court noted Mohn had not raised the Bailey claim on direct appeal, found he had waived it, and dismissed the § 2255 motion with prejudice, quoting United States v. McKinney, 79 F.3d 105 (8th Cir. 1996) (2-1 decision) (holding Bailey issue waived on direct appeal because McKinney did not challenge previous cases, object to the instruction, or argue issue in opening brief).

Discussion

I dissent because I believe the Due Process Clause of the Fifth Amendment does not permit federal convictions for conduct that does not violate a federal statute.[1]

Congress must define federal criminal offenses. United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812). Judicial construction of a statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise

[1]For that reason, I also disagree with the court's holding that Bailey challenges cannot be raised in a § 2255 motion after a plea of guilty. Bousley v. Brooks, No. 95-2687, 1996 WL 560214, at *3-4 & nn.2-4 (8th Cir. Oct. 3, 1996). The better position is, in my opinion, United States v. Barnhardt, 93 F.3d 706, 708-09 (10th Cir. 1996) (applying Bailey retroactively in second § 2255 motion after defendant pleaded guilty) (collecting Bailey cases).

to that construction." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994) (Rivers) (footnote omitted). Under these two principles, courts have granted post-conviction relief after changes in the law. See, e.g., Davis v. United States, 417 U.S. 333, 346-47 (1974) (§ 2255 proper when law changes so that conviction and punishment are for act the law no longer makes criminal) (change in interpretation of selective service regulation); United States v. Dashney, 52 F.3d 296, 299 (10th Cir. 1995) (applying new interpretation of "financial structuring" offense in § 2255 action after defendant had served sentence to prevent complete miscarriage of justice); Dalton v. United States, 862 F.2d 1307, 1310 (8th Cir. 1988) (finding new interpretation of mail fraud statute applicable but affirming because no prejudice shown under standard that trial error worked to § 2255 movant's "actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions," citing United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original)); Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988) (applying new interpretation of mail fraud statute in § 2255 action and excusing failure to raise the claim under earlier interpretation).

The Second Circuit invoked constitutional principles when it confronted four § 2255 challenges to drug convictions in the wake of the Supreme Court's invalidation of statutory presumptions. The court relied on

> the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law. . . . We must examine the principles involved in the constitutional ruling under consideration and decide whether, upon "considerations of convenience, of utility, and of the deepest sentiments of justice," the judgments of conviction were so "tainted by some fundamental unfairness within the orbit of constitutional law" that we cannot allow them to stand.

United States v. Liguori, 438 F.2d 660, 669 (2d Cir. 1971) (internal citation omitted).

In post-Bailey § 2255 cases, the issue is not advance notice that conduct is criminal (the familiar void-for-vagueness claim), but delayed notice that conduct is not criminal (change-of-law claim under Rivers rationale). Because Bailey represents such a clear break with precedent regarding the definition of "use" under § 924(c)(1), Hohn had cause for failing to appeal the denial of his objection to the verdict director. United States v. Wiley, 922 F. Supp. 1405, 1411 (D. Minn. 1996) (Magnuson, C.J.); see also Dyer v. United States, 23 F.3d 1421, 1423-24 (8th Cir.) (rejecting change of law in another circuit as cause), cert. denied, 115 S. Ct. 136 (1994); Dalton v. United States, 862 F.2d at 1310 (finding cause after new interpretation of mail fraud statute).

Conclusion

I conclude that depriving persons of the benefit of the delayed notice that conduct is innocent violates Due Process by tolerating convictions for conduct that was never criminal. Under that proposition, a post-Bailey § 2255 motion presents a constitutional question as required by amended § 2253(c)(2). I also conclude Hohn's case presents a "substantial showing of the denial of a constitutional right." Accordingly, I would grant a certificate of appealability.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ARNOLD F. HOHN,)
)
Defendant.)

8:CR90-93

MEMORANDUM OPINION

FILED
DISTRICT OF NEBRASKA
AT _____ M
JUL 18 1996
-187
Norbert H. Ebel, Clerk
By _____ Deputy

This matter is before the Court on the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175). Because the Court finds that the defendant is not entitled to the relief he seeks, the Court will dismiss the defendant's motion.

In his motion, the defendant attacks his conviction for using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The defendant argues that, in light of the United States Supreme Court's opinion in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the government did not present enough evidence at his trial to sustain a conviction under § 924(c)(1). However, as Magistrate Judge Piester noted upon initial review of the defendant's motion, the defendant did not raise his *Bailey* claim on direct appeal. *See* filing 176, p. 3. Thus, the Court finds that the defendant has waived that claim, *see United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996)

(concluding that Mr. McKinney had waived his argument based on *Bailey* because "Mr. McKinney's motion for acquittal did not challenge the correctness of [the Eighth Circuit's] previous cases, he did not object to the instruction that embodied the principles announced in those cases, and he did not argue in his initial appeal brief that his conviction for using firearms was in any way infirm"), and that the defendant's motion, which is based on that claim, should be dismissed with prejudice. Accordingly, the Court will enter separate judgment dismissing the defendant's motion with prejudice.

Dated this 18 day of July, 1996.

BY THE COURT:

WILLIAM G. CAMBRIDGE, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
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ROBERT M. GIEL
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARNOLD F. HOHN,

Defendant.

8:CR90-93

MEMORANDUM AND ORDER

Defendant Hohn has filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (See filing 175). Liberally construing the allegations of the motion, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), I conclude that the government should respond to defendant's claim.

BACKGROUND

Defendant was convicted on one count of possession with intent to distribute methamphetamine near a school, in violation of 21 U.S.C. §§ 841(a), 845(a); one count of carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g). Defendant was sentenced to serve a term of 90 months in prison. He appealed the sentence and the United States Court of Appeals for the Eighth Circuit affirmed.

Defendant now attacks his firearm conviction under 18 U.S.C. § 924(c)(1) on the ground that the government failed to present

evidence sufficient to establish that he "used" a firearm within the meaning that statutory section. As support for that claim defendant cites Bailey v. United States, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).[1]

DISCUSSION

A section 2255 motion is not a substitute for direct appeal. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994); Poor Thunder v. United States, 810 F.2d 817, 823 (8th Cir. 1987). As such, a claim which could have been presented on direct appeal generally will not be considered in a section 2255 proceeding absent a showing of "cause" for the failure to raise the issue and "actual prejudice" resulting from that failure. Ramey v. United States, 8 F.3d 1313, 1314 (8th Cir. 1993); Reid v. United States, 976 F.2d 446, 447-48 (8th Cir. 1992), cert. denied, 113 S. Ct. 1351 (1992). To show cause that would excuse such a procedural default, a defendant must show that some objective

[1] In Bailey, the United States Supreme Court held that, to obtain a conviction for use of a firearm under 18 U.S.C. § 924(c)(1), the government must prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey, 116 S.Ct. at 505. In so ruling, the Supreme Court overruled prior authority holding that a defendant could be convicted under § 924(c)(1) based on evidence that the firearm was physically available to the defendant or that the defendant intended to use it if the need arose. See e.g., United States v. Jones, 990 F.2d 1047, 1050 (8th Cir. 1993) ("'use' may be inferred from the availability and presence of the firearm, and actual possession is not necessary provided the firearm is under the defendant's control"), cert. denied, 114 S.Ct. 699 (1994), denial of habeas corpus aff'd, 39 F.3d 1184 (8th Cir. 1994).

The Bailey decision applies retroactively. Bell v. United States, 917 F.Supp. 681, 683-84 (E.D. Mo. 1996); Sanabria v. United States, 916 F.Supp. 106, 109-14 (D. P.R. 1996); United States v. Turner, 914 F.Supp. 48, 49-50 (W.D. N.Y. 1996); Abreu v. United States, 911 F.Supp. 203, 206-07 (E.D. Va. 1996).

factor external to the defense prevented him from raising his defaulted claims. See Murray v. Carrier, 477 U.S. 478, 488 (1986).

Defendant in this case did not raise his Bailey claim on direct appeal. However, the Bailey decision was not handed down by the Supreme Court until December 6, 1995, more than two years after defendants' convictions had been affirmed by the Eighth Circuit. Because Bailey was not decided at the time of the direct appeal, there is adequate cause for defendant's failure to raise it. Bell v. United States, 917 F.Supp. 681, 684 (E.D. Mo. 1996); Abreu v. United States, 911 F.Supp. 203, 207 (E.D. Va. 1996). Further, because the facts of defendant's case arguably fall within the purview of Bailey, his conviction under 18 U.S.C. § 924(c)(1) may be invalid, and he thus has established sufficient prejudice. See id.[2]

Consideration of the substance of defendant's claim under Bailey is beyond the scope of this initial review. I shall therefore require the government to respond to defendant's claim.

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff is given twenty days from the date of this order to respond to the defendant's motion in accordance with the terms of this memorandum, pursuant to the rules following 28 U.S.C. §2255.

[2] The Eighth Circuit has recently held that Bailey is inapplicable where a defendant is convicted under section 924(c)(1) for "carrying" a firearm, as opposed to "using" a firearm. See United States v. White, ___ F.3d ___ (8th Cir. 1996) (available at 1996 WL 154228). The judgment in this case indicates that defendant was convicted of "carrying" a firearm in violation of section 924(c)(1). (See filing 158). However, the jury was instructed on both the "using" and "carrying" prongs of section 924(c)(1) and the verdict form does not clearly state which of those prongs the jury relied on in finding defendant guilty. (See filing 114, Instruction No. 7; filing 116). Thus, it is impossible to determine whether defendant was convicted under the "carrying" prong or the "using" prong of section 924(c)(1).

2. This file hereby is transferred to Omaha for all further proceedings. The clerk shall direct this matter to the attention of the assigned trial judge.

Dated ~~April~~ May 1, 1996.

BY THE COURT

David L. Piester
United States Magistrate Judge

UNITED STATES of America, Appellee,
v.
Arnold F. HOHN, Appellant.

No. 92-2653.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 16, 1993.

Decided Nov. 8, 1993.

Defendant was convicted by the United States District Court for the District of Nebraska, William G. Cambridge, J., of distributing drugs within 1,000 feet of public school, and he appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) period during which court considered petition by pretrial services for action on conditions of pretrial release and period when defendant received in-patient drug treatment were excludable for purposes of Speedy Trial Act; (2) affidavit supporting search warrant set forth probable cause based on corroboration of informant's information by police officers; and (3) school yard statute's penalties applied even though school was not in session.

Affirmed.

[1] CRIMINAL LAW ⇐ 577.10(8)
110k577.10(8)
Speedy Trial Act allows for exclusion of periods of delay due to proceedings concerning defendant. 18 U.S.C.A. § 3161(h)(1)(F).

[2] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Period of delay after pretrial services officer filed petition for action on conditions of defendant's pretrial release until final disposition after hearing was excluded for purposes of the Speedy Trial Act; pretrial services' petition was functional equivalent of government's motion to revoke detention within scope of statute's enumerated delays. 18 U.S.C.A. § 3161(h)(1)(F), (h)(4).

[3] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Delay attributable to motion to revoke pretrial detention is excluded for purposes of Speedy Trial Act from date of filing until matter is taken under advisement by court. 18 U.S.C.A. § 3161(h)(1)(F), (h)(4).

[4] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Any action taken by pretrial services is action by court excluded under Speedy Trial Act. 18 U.S.C.A. § 3161(h), (h)(1)(B, F, J), (h)(3)(A), (h)(7), (h)(8)(A).

[5] CRIMINAL LAW ⇐ 577.16(5.1)
110k577.16(5.1)
District court did not err when it allowed hearing on pretrial services' petition for actions on condition of pretrial release to be continued without making findings; court was not required to make explicit findings for excludable delays in action initiated by court. 18 U.S.C.A. § 3161(h)(1), (h)(1)(F), (h)(8)(A).

[6] CRIMINAL LAW ⇐ 577.11(6)
110k577.11(6)
Period of time when defendant was in drug treatment program before trial was properly excluded for Speedy Trial Act purposes, where district court did not receive all information necessary to determine defendant's motion to reconsider detention until he completed drug treatment. 18 U.S.C.A. § 3161(h)(1)(F), (h)(4).

[7] CRIMINAL LAW ⇐ 577.10(7)
110k577.10(7)
Motion to reconsider pretrial detention is pretrial motion for which time is excludable under Speedy Trial Act. 18 U.S.C.A. § 3161(h)(1)(F).

[8] DRUGS AND NARCOTICS ⇐ 189(3)
138k189(3)
No-knock search warrant of defendant's house was issued with probable cause, where police officers sufficiently corroborated information given by informant by conducting garbage inventory and testing drug-related items found in garbage. U.S.C.A. Const.Amend. 4; Neb.Rev.St. § 29-411; 18 U.S.C.A. § 3109.

[9] DRUGS AND NARCOTICS ⇐ 133
138k133

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Defendant was properly indicted for distributing drugs within 1,000 feet of school, though school was closed for remodeling, where public school system continued to carry school on its books, and children continued to use school grounds. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 419, as amended, 21 U.S.C.A. § 860.

*1302 James M. Davis, Omaha, NE, argued, for appellant.

Michael P. Norris, Omaha, NE, argued, for appellee.

Before MAGILL, Circuit Judge, LAY, Senior Circuit Judge, and HANSEN, Circuit Judge.

MAGILL, Circuit Judge.

Arnold F. Hohn (Hohn) appeals from the final judgment entered in the district court [FN1] upon a jury verdict of guilt on all offenses. Hohn's appeal challenges three rulings of the district court. Hohn contends that the district court erred by denying his motion to dismiss on Speedy Trial Act grounds, by denying his motion to suppress evidence, and, finally, by denying his motion to dismiss Count I of the indictment which charged him with the distribution of drugs within 1000 feet of a public school. For the reasons discussed below, we affirm.

FN1. The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

I. BACKGROUND

The Omaha, Nebraska, police received information from a confidential informant implicating Hohn as a methamphetamine dealer distributing from his home. The informant told the police, among other details, that Hohn was "paranoid," had a vicious dog, and always had at least one gun on his person. The police investigated the information received from the informant and, in the course of the police investigation, Hohn's curbside garbage receptacle was inventoried. The garbage inventory and subsequent testing revealed, among other drug-related items, a zip-lock bag and sno-seals [FN2] that both tested positive for methamphetamine. The police obtained a "no-knock" search warrant pursuant to Nebraska state law. Hohn was arrested when the search of his residence on June 20, 1990, resulted in the recovery of approximately sixteen grams of methamphetamine, drug paraphernalia, multiple weapons, and money.

FN2. Sno-seals are folded paper used to hold powdered substances such as cocaine and methamphetamine.

Hohn's residence was located within 177 feet of the Central Park Elementary School (Central Park). Central Park's last day of classes for the 1989-90 school year was June 7, 1990. Because the Omaha public school system planned to remodel and attach an addition to the present building, the student body was temporarily reassigned to another building for the 1990-91 school year. From the last day of classes through the date of Hohn's trial, Central Park was carried on the school system's books as a public school. On June 20, 1990, the date of Hohn's arrest, the public maintained access to the school grounds for recreational purposes.

Hohn was consequently indicted on August 24, 1990, on three counts: (I) possession with intent to distribute methamphetamine within 1000 feet of real property comprising a public school in violation of 21 U.S.C. § 845a; (II) use of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1); and (III) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). Hohn made an initial appearance at his arraignment on August 30, 1990.

To gain additional time for pretrial motions, the government and Hohn entered into a stipulated agreement to extend the time for pretrial motions until October 19, 1990. The court then entered an order stating that the time between September 19 and October 19 *1303 was excludable for Speedy Trial Act purposes.

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On October 1, 1990, a pretrial services officer filed a petition for action on conditions of pretrial release (the petition), thus notifying the court that Hohn's urine specimens had tested positive for amphetamine and methamphetamine. The court consequently held a hearing regarding that petition on October 11, 12, and November 9, 1990. The defendant and the government both presented evidence and argument at this hearing. The court found on November 9 that the government had presented clear and convincing evidence that Hohn had violated his conditions of release and ordered Hohn detained.

Hohn's counsel filed a motion to withdraw on December 10, 1990, and the court allowed Hohn's counsel to withdraw on December 18, 1990. On that same date, Hohn's new counsel filed a motion to reconsider detention and urged the court to place Hohn in drug treatment as opposed to continuing to detain him. The court requested pretrial services to investigate Hohn's eligibility for drug treatment and, on December 20, pursuant to pretrial services' advice, released Hohn and ordered him to complete inpatient drug treatment or return to custody. The December 20, 1990, order specifically stated that if Hohn successfully completed drug treatment, a subsequent hearing would be held regarding further terms and conditions of release. Hohn entered inpatient treatment at St. Gabriel's Alcohol and Drug Treatment Center on December 20, 1990.

Hohn filed a motion to dismiss on Speedy Trial Act grounds on January 14, 1991. Meanwhile, on January 23, 1991, Hohn completed drug treatment and was released pursuant to a court order specifying his terms and conditions of release.

II. DISCUSSION

A. The Speedy Trial Act Claim

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988), requires that a criminal defendant be tried within seventy days of the indictment or the date of first appearance before a judicial officer, whichever is later. Id. § 3161(c)(1). The statute allows, however, certain delays to be excluded for purposes of calculating the seventy-day time limit. See id. § 3161(h). If the government fails to comply with the terms of the Speedy Trial Act, a defendant may move for dismissal either with or without prejudice. Id. § 3162(a). The district court's legal findings are reviewed de novo, but factual findings are reviewed under the clearly erroneous standard. United States v. Hoslett, 998 F.2d 648, 652 (9th Cir.1993).

Hohn argues that the court incorrectly excluded two periods of delay from its calculation for Speedy Trial Act purposes: (1) the period from October 20 through November 9 (twenty-one days), during which the court considered pretrial services' petition [FN3]; and (2) the period from December 21 through January 13, 1991 (twenty-four days), during which Hohn was treated as an inpatient at St. Gabriel's Alcohol and Drug Treatment Center. [FN4] The district court [FN5] excluded both these periods of time from its calculation of the seventy-day limit because it found that the first period was excludable pursuant to § 3161(h)(1)(F) as a pretrial motion and the second period of time was excludable pursuant to either § 3161(h)(1)(F) or, in the alternative, § 3161(h)(4). We find that for purposes of determining whether the Speedy *1304 Trial Act seventy-day limit had lapsed, both periods of time were properly excluded from the district court's calculation of time.

FN3. Pretrial services' petition was filed on October 1. However, the period of time up to and including October 19 is not in dispute.

FN4. The status of the other days is not in dispute. The parties agree that the period from August 31, 1990, through September 18, 1990, counts towards the 70-day limit (a total of 19 days). The parties likewise agree that September 19 through October 19 is excludable pursuant to the stipulated agreement. The parties agree that the period of time from November 10 through December 9 counts towards the 70-day limit (bringing the total to 49 undisputed days). The parties also agree that December 10 through December 20 is excludable due to the motions that were filed before the court.

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FN5. Magistrate Judge Richard G. Kopf made these findings. The district court, after a de novo review, adopted the magistrate judge's report in its entirety. The magistrate judge's findings subsequently adopted by the district court will be referred to as the district court findings.

1. October 20, 1990, through November 9, 1990

[1] The period of time from October 20 through November 9 was properly excluded pursuant to § 3161(h)(1)(F) (subsection (F)) as a pretrial motion. The Speedy Trial Act allows for the exclusion of periods of delay due to proceedings concerning the defendant. The Act states in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
> ....
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

18 U.S.C. § 3161(h)(1)(F).

[2] Hohn contends that the period of delay from October 20 through November 9 cannot be excluded pursuant to subsection (F) because subsection (F) refers to pretrial motions and not petitions. Hohn further contends that because the petition was filed by pretrial services, and not a party, the court may not exclude this period of delay pursuant to subsection (F). Finally, Hohn contends that when the court granted continuances from the hearing's initial date of October 11 to October 12 and then to November 9, the court erred when it failed to make the specific statutory finding required pursuant to § 3161(h)(8)(A).

Section 3161(h)(1) specifically states that the periods of delay are "including but not limited to," thus creating in the statute the presumption that the scope of its enumerated delays are not to be interpreted narrowly. A motion is an application to the court for an order. Fed.R.Crim.P. 47. Once pretrial services had filed its petition, the government, now notified of Hohn's possible violation of his terms of release, was requesting the court to revoke Hohn's release--issue an order--when it presented its argument and evidence before the court on October 11, 12, and November 9.

We find that pretrial services' petition is the functional equivalent of a motion to revoke detention. Pretrial services discovered through urine testing that Hohn tested positive for methamphetamine. The use of methamphetamine was a violation of Hohn's original conditions of release and hence pretrial services was obligated to inform the court of its discovery. After the petition was filed, the government proceeded to prosecute the claim that Hohn had violated the court's original conditions of release. The court noted in its order revoking release that the government had established clear and convincing evidence that the defendant violated a term of release. Hence, the court treated the petition precisely as it would have treated a motion for revocation of release brought either by the court's own motion or by the government. If the initial filing with the court had been brought by the government as a motion, Hohn's contention that the period from October 20 through November 9 cannot be excluded for Speedy Trial Act purposes would be untenable.

Petitions may be the functional equivalent of other recognized § 3161(h)(1) delays. See United States v. Davenport, 935 F.2d 1223, 1233 (11th Cir.1991); accord United States v. Tyler, 878 F.2d 753, 757 (3d Cir.), cert. denied, 493 U.S. 899, 110 S.Ct. 254, 107 L.Ed.2d 203 (1989). In Davenport, the defendant filed a petition for a writ of habeas corpus alleging that his pretrial detention violated the Speedy Trial Act. 935 F.2d at 1231. The Davenport court found that an extraordinary writ such as a petition for a writ of habeas corpus was functionally equivalent to an interlocutory appeal which is statutorily excludable under § 3161(h)(1)(E), because both an interlocutory appeal and a petition for a writ serve the same

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underlying purpose. Id. at 1233. Hence, in Davenport, time related to the petition for a writ's determination tolled the Speedy Trial Act clock. *1305 Similarly, we find that pretrial services' petition for action on conditions of pretrial release is the functional equivalent of a motion to reconsider pretrial release, because both serve the same underlying purpose.

[3] Motions excludable under subsection (F) include any pretrial motion and are not limited to those motions enumerated in Federal Rule Criminal Procedure 12(b)(2). United States v. Wilson, 835 F.2d 1440, 1443 (D.C.Cir.1987). Pretrial motions are excludable under subsection (F) because these motions require both court and party time. Id. Delay attributable to motions to revoke pretrial detention, from the date of filing until the matter is taken under advisement by the court, [FN6] is excluded pursuant to subsection (F). United States v. Bowers, 834 F.2d 607, 609 (6th Cir.1987). Thus, because pretrial services' petition is the functional equivalent of a motion to revoke pretrial detention, we find the time from the date the petition was filed until its final disposition at the end of the hearing is excluded for purposes of the Speedy Trial Act.

FN6. Subsection (F) excludes time from a motion's filing until either the motion is disposed of or taken under advisement. If the court requires time to consider the motion after all information is available, this time is limited to 30 days pursuant to § 3161(h)(1)(J). Henderson v. United States, 476 U.S. 321, 329, 331, 106 S.Ct. 1871, 1876, 1877, 90 L.Ed.2d 299 (1986).

[4] A nonparty to a criminal action may initiate a delay excludable pursuant to § 3161(h). Excludable delays may be caused by co-defendants. See id. § 3161(h)(7). Excludable delays may also be initiated by the court. See, e.g., id. § 3161(h)(1)(B), (C), (3)(A), (8)(A). The Pretrial Services Act of 1982 [FN7] established pretrial services in each judicial district in order to assist judicial officers both in making pretrial release decisions and to supervise and monitor the conditions of release. S.Rep. No. 97-77, 97th Cong., 2d Sess. 1 (1981), reprinted in 1982 U.S.C.C.A.N. 2377. The actions of pretrial services officers are both a service to the court and an extension of the court. Any action taken by pretrial services is in effect an action by the court and thus contemplated by Congress in enacting the Speedy Trial Act.

FN7. See 18 U.S.C. § 3152 (1988).

[5] Hohn's argument that the district court erred when it failed to make a § 3161(h)(8)(A) [FN8] statutory finding is without merit. Section 3161(8)(A) allows a court to grant continuances should that court find it is in the interests of justice to do so after weighing the best interests of the defendant and the public to a speedy trial. The court under § 3161(8)(A) is required to make explicit findings; the court is not required to make explicit findings for § 3161(h)(1) delays. Section 3161(8)(A) provides an additional basis, in addition to the (h)(1) bases, for the court to grant a delay which will toll the Speedy Trial Act clock. For example, § 3161(8)(A) is frequently used by the court to grant continuances which will toll the Speedy Trial Act clock when, due to complexities in the case, counsel requires additional time to prepare. See United States v. Driver, 945 F.2d 1410, 1414 (8th Cir.1991), cert. denied, 502 U.S. 1109, 112 S.Ct. 1209, 117 L.Ed.2d 448 (1992); United States v. Fogarty, 692 F.2d 542, 546 (8th Cir.1982), cert. denied, 460 U.S. 1040, 103 S.Ct. 1434, 75 L.Ed.2d 792 (1983). The district court did not err when it allowed the hearing to be continued without making findings; here, the time was properly excluded pursuant to subsection (F), not § 3161(8)(A).

FN8. 18 U.S.C. § 3161(h)(8)(A) states in pertinent part: Any period of delay resulting from a continuance granted by any judge ... if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth ... its reasons for finding that the ends of justice served by the granting of such continuance

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outweigh the best interests of the public and the defendant in a speedy trial.

2. December 21, 1990, through January 13, 1991

[6] We further find that the period of time from December 21, 1990, through January *1306 13, 1991, was properly excluded for Speedy Trial Act purposes pursuant to subsection (F). [FN9] Hohn filed a motion to reconsider detention on December 18. [FN10] The district court requested the advice of pretrial services. After a hearing on December 20, 1990, and upon the advice of pretrial services, the court entered an order conditionally releasing Hohn on December 20 in order that Hohn could be evaluated at St. Gabriel's Alcohol and Drug Treatment Center. If Hohn was not accepted into drug treatment, he was to be returned to the custody of the United States Marshal. If Hohn failed to successfully complete drug treatment, he was to be returned to the custody of the Marshal. Only upon successful completion of the drug treatment program would the district court then consider granting a release order with specific terms and conditions.

FN9. The district court found this period of time was also excludable pursuant to § 3161(h)(4); that is, the district court found that Hohn while in drug treatment was physically unable to stand trial. Because we find this period of time was properly excluded pursuant to subsection (F), we need not reach the issue of Hohn's physical availability for trial while in drug treatment.

FN10. Hohn concedes that subsection (F) excludes the period of time from December 18 through December 20 and is therefore only contending that the period from December 21 through January 13 was improperly excluded.

[7] A motion to reconsider pretrial detention is a pretrial motion for which time is excludable pursuant to subsection (F). United States v. Noone, 913 F.2d 20, 27 (1st Cir.1990), cert. denied, 500 U.S. 906, 111 S.Ct. 1686, 114 L.Ed.2d 81 (1991). Thus, when Hohn filed his motion to reconsider detention on December 18, subsection (F) tolled the Speedy Trial Act clock until all information necessary to that motion's determination was before the court. Subsection (F) excludes the period of time after a motion is submitted but before it is under advisement. Henderson, 476 U.S. at 331, 106 S.Ct. at 1877. That is, subsection (F) excludes the period of time after a hearing in which the court record may remain open to receive further information. Here, the district court did not receive all the information necessary to determine the motion to reconsider detention until January 23, 1991, when Hohn completed drug treatment. The district court's order setting conditions of release was not issued until January 23, 1991. Consequently, during the entire time period at issue, from December 21 until January 13, 1991, the Speedy Trial Act clock was tolled pursuant to subsection (F).

We therefore find that both the period of time from October 20 through November 9 and the period of time from December 21 through January 13, 1991, were properly excluded pursuant to subsection (F). Hence, the motion to dismiss was properly denied because only forty-nine nonexcludable days had passed since Hohn's arraignment before a judicial officer.

B. Other Claims

Hohn makes two other claims: (1) that the district court erred when it denied his motion to suppress evidence, and (2) that the district court erred when it denied his motion to dismiss Count I.

[8] Hohn asserts that evidence obtained from the search of his home should not have been admissible at his trial because the search warrant was defective. He claims that the search warrant was issued without probable cause, and he claims that the state-issued no-knock search warrant [FN11] violated 18 U.S.C. § 3109. Neither contention has merit. The district court properly concluded that the affidavit supporting the search warrant set forth probable cause, because the police officers sufficiently corroborated the information given by the informant. Furthermore, 18 U.S.C. § 3109 [FN12] is

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inapplicable. See United States v. Moore, 956 F.2d 843 (8th Cir.1992). The issue is not whether the *1307 warrant complied with § 3109 but whether the state officials complied with Nebraska law and the Fourth Amendment. See id. at 848. We find that the district court properly denied the motion to suppress the evidence obtained from this warrant because it was supported by probable cause and complied with Nebraska law and the Fourth Amendment.

FN11. In Nebraska no-knock warrants are expressly allowed. Neb.Rev.Stat. § 29-411 (1989).

FN12. 18 U.S.C. § 3109 provides: The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[9] Hohn also contends that Count I of the indictment should have been dismissed because he did not distribute drugs within 1000 feet of a school. The schoolyard statute [FN13] enhances the penalty for individuals convicted of distributing drugs within 1000 feet of a school. 21 U.S.C. § 860 (Supp. III 1988). Hohn's residence was located within 177 feet of Central Park. He argues that Central Park was not a public school at the time of the offense because it was not operational. That is, Hohn maintains that because Central Park was closed for remodeling at the time of the arrest that it was not a school as a matter of law.

FN13. Hohn was charged in Count I with a violation of 21 U.S.C. § 845a; however, this statute has been transferred to 21 U.S.C. § 860.

The schoolyard statute, however, is unambiguous. For conviction, it simply requires that the defendant have an intent to distribute (or manufacture) a controlled substance and at the time be within 1000 feet of a school. See 21 U.S.C. § 860. Nothing in the statute requires that school be in session or that children be near or around the school at the time of the offense. See United States v. Jones, 779 F.2d 121, 123 (2d Cir.1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1236, 89 L.Ed.2d 344 (1986). In Jones, the defendant argued that the schoolyard statute did not apply to his distribution of drugs because the offense occurred at night without any potential for affecting children. Id. The Jones court rejected this argument finding, as we do, that the language in the statute is unambiguous and does not require that a school be open at the time of the offense. Id.

The magistrate judge found in an opinion adopted by the district court that as a preliminary matter there was sufficient evidence to find that Central Park was a school. The final determination as to whether Central Park met the statutory definition of school was determined by the magistrate judge to be a question of fact appropriate for the jury. See also United States v. Brookins, 919 F.2d 281, 284 (5th Cir.1991) (holding that there was sufficient evidence before the jury for it to find by any common definition that the institution in question was a school). We agree. The Omaha public school system continued to carry Central Park on its books as a school. The children continued to use the school grounds. A school need not be in session to trigger the schoolyard statute's penalties. The district court did not err when it denied Hohn's motion to dismiss Count I.

III. CONCLUSION

Accordingly, we find that the district court properly denied Hohn's motion to dismiss on Speedy Trial Act grounds, his motion to suppress evidence, and his motion to dismiss Count I of the indictment. We affirm the judgment of the district court.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-3118NEO

Arnold F. Hohn,

Appellant,

vs.

United States of America,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion. The petition for rehearing by the panel is also denied.

February 10, 1997

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
95 JUN 29 PM 4:13
ROBERT H. EBEL
CLERK

UNITED STATES OF AMERICA, Plaintiff,	)	8:CR 90-00093
vs.	)	ANSWER TO FILING #175
ARNOLD F. HOHN, Defendant.	)	

Pursuant to Rule 5, Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, and this Court's Order of May 1, 1996, the United States answers Filing #175, Defendant's Motion to Vacate, Set Aside or Correct Sentence, as follows:

1. The United States denies that Arnold F. Hohn is entitled to any post-conviction relief. No evidentiary hearing has been accorded regarding the post-conviction motion. An evidentiary hearing will not be needed as this matter can be resolved on the basis of the record and files before the Court. The United States respectfully submits that this is an issue of law that must be developed from the transcript of the record at trial and post-conviction pleadings and briefs.

2. Hohn claims that his Section 924(c) conviction should be vacated because of the United States Supreme Court's recent decision in Bailey v. United States, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The United States denies that the Supreme Court's decision in Bailey would grant relief to Hohn. The United States would submit that sufficient evidence was presented to support the jury's verdict and Hohn's conviction for carrying a firearm.

3. The United States acknowledges that the jury instruction provided does not comport with the status of law since the Supreme Court's decision in Bailey.

Under Federal Rule of Criminal Procedure 30, in order to claim error in a jury instruction, an objection is required which specifies the grounds of the objection. In the present case, the charge to the jury with regard to the 924(c) violation is found in instruction #7. Although Hohn objected to instruction #7, his objection did not go to whether one must affirmatively brandish a firearm but, rather, objected to the wording of the particular instruction. Specifically, Hohn asked the Court to drop the words "to aid in the commission of" and substitute the words "for the purpose of aiding in the commission of." (Tr. at 1332-34). Therefore, only if there is plain error, may this the Court vacate the conviction.

In United States v. Caldwell, 954 F.2d 496 (8th Cir. 1992), the Eighth Circuit Court of Appeals said

> "the Supreme Court has explained that the plain-error doctrine 'authorizes the Court of Appeals to correct only 'particularly egregious errors'. . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982) and United States v. Atkinson, 297 U.S. 157, 160 (1936)).

The plain-error rule is to be "'used sparingly,'" and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or when the error deprives the accused of a fundamental right. Young, 470 U.S.

at 15 (quoting Frady, 456 U.S. at 63); United States v. Garcia, 897 F.2d 1413, 1422 (7th Cir. 1990). Id. 500-501.

The government agrees that it would be plain-error had the instructions only given the jury the option of convicting the defendant under the "use" prong of 18 U.S.C. § 924(c), and the evidence only supported that option. However, in this case, as in Bailey, the jury was instructed that the defendant could be convicted if he used or carried a firearm.

4. The question remains as to the appropriate standard of review. The Third Circuit, in a case involving a Bailey question, has observed:

> "we must now determine whether the district court's error in instructing the jury was harmless or requires reversal of Mr. Price's conviction on the Section 924(c)(1) count. The error was one of statutory interpretation, not constitutional in nature. "We upheld that non-constitutional error is harmless when 'it is highly probable that the error did not contribute to the judgement.'" . . . citations omitted. Because we conclude that the error was harmless, we will affirm.

United States v. Price, 1996 W.L. 67398 (3rd Cir. (Pa.)), at p. 4.

If the Court determines that the error was constitutional in nature, the standard of review would be whether the error was harmless, beyond a reasonable doubt. See United States v. Davis, 417 U.S. 333, 346 (1974); Chapman v. California, 386 U.S. 11 (1967).

5. Evidence was presented to the jury that Hohn carried a firearm. That evidence is recited in the prosecution version and can be found at the transcript of trial. It is true that Hohn did

not have a firearm on his person when the Omaha Police Division's Emergency Response Unit entered and secured the residence for the purpose of executing a search warrant. However, a reasonable inference can be drawn from the evidence that Hohn was carrying a firearm prior to the officers' entry based upon the items that were located, i.e., drugs, guns and ammunition, and where they were located.

The search resulted in the recovery of approximately 16 grams of methamphetamine. One of those grams was recovered from Hohn's person. (Tr. at 408, 646; Exhibit 1). Approximately 12 grams of methamphetamine were contained in a brown case on the kitchen counter. The methamphetamine was further contained in four plastic baggies, three of which held 3.5 grams of methamphetamine. This methamphetamine was surrounded by a .380 caliber semi-automatic pistol, a Colt revolver and a Ruger .357 pistol, all within arms reach of the methamphetamine. Each of these weapons was loaded. (Tr. at 159-160, 163-169, 647; Exs. 8, 9, and 10). Two additional firearms, a Ruger .22 caliber semi-automatic pistol and an Excam .22 caliber revolver were also found in the kitchen. (Tr. at 417-420, 648; Exs. 18, 19 and 20).

The .380 caliber semi-automatic pistol and the Colt revolver found on the kitchen counter within arms reach of the methamphetamine, packaged for redistribution, were found in holsters. The obvious inference to be drawn from this evidence is that Hohn, at some time prior to the execution of the search warrant, entered his residence and placed his belongings, which

included the methamphetamine and firearms, onto the counter. Therefore, at some point prior to the execution of the search warrant, he obviously carried the firearms during his drug trafficking activities.

6. The evidence obviously establishes "carrying," under 18 U.S.C. § 924(c). The Supreme Court said in Bailey, "a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction." Furthermore, in United States v. Freisinger, 937 F.2d 383, 387 (1991), this court held that transporting weapons in the passenger compartment of a car constitutes carrying them within the meaning of the statute.

7. The United States respectfully submits that the instruction to the jury was error, but harmless. The United States respectfully submits that the Motion to Vacate, Set Aside or Correct Sentence should be denied. The United States would inform the Court that a similar issue is presently before the Eighth Circuit Court of Appeals. On April 8, 1996, the Court heard argument in United States v. Behler, Case No. 92-3956NEL. As of this date, a decision has not been rendered.

Respectfully submitted,

THOMAS J. MONAGHAN
United States Attorney

Michael P. Norris

By: MICHAEL P. NORRIS (#17765)
Assistant United States Attorney
P.O. Box 1228-DTS
Omaha, Nebraska 68101-1228

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing was served on the following by placing same in the U.S. Mails, postage prepaid, this 28th day of June, 1996.

Arnold F. Hohn, #13249-047
P.O. Box 1000
Leavenworth, Kansas 66048

Michael P. Norris
Assistant U.S. Attorney

Eighth Circuit instructions to the extent they have and I will withdraw my request for them.

THE COURT: All right. Thank you. Now, Mr. Cohen, do you have any objections to the Court's proposed instructions 1 through 30 --

MR. COHEN: Yes, Your Honor.

THE COURT: -- inclusive, as they have now been amended?

MR. COHEN: Yes, Your Honor, I do. I think I have just two. The first concerns Instruction Number 7.

THE COURT: All right.

MR. COHEN: The present language half way down the page that paragraph starts out, "The phrase 'used a firearm' means having a firearm available to aid in the commission of," and it goes on and then later in that same paragraph says, "but does not require proof beyond a reasonable doubt that the firearm was available to provide protection." And I would ask that the Court change the phrase to instead read, "for the purpose of."

THE COURT: I'm sorry, I am --

MR. COHEN: I wasn't very eloquent. I believe the instruction as it is now allows this jury to find that merely having a firearm available is sufficient, and in this case where the defendant collected guns and used them for other purposes, there is on doubt that firearms were available

to aid in the commission of a drug offense, but whether those firearms were present for the purpose of aiding in the commission of that offense is a different question, and I think the intent of the statute was to prohibit people from using firearms to further their drug activities. I think this instruction as it is now allows the jury to convict Mr. Hohn even if there was no evidence that he was using these firearms to or that he had them available to him to further his drug activities. So I am suggesting that we should drop the where it says, "to aid in the commission of" and change that to read "for the purpose of aiding in the commission of."

THE COURT: That phrase comes out of the pattern Eighth Circuit, it doesn't come out of the pattern Eighth Circuit instruction itself, the form of it, which is 6.18.924, but it comes out of the language that is contained in the section of that pattern instruction entitled Notes on Use. I refer specifically to page 4 thereof, which is footnote 8, footnote 8 of the instruction, the pattern form instruction, which is in place in the form following the word carry. There it says, "No definition of carry is provided, but where carrying is charged," and it is charged here, "a definition may be appropriate. Carrying does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," with reference to, cited there, three cases. One of them is the Fifth Circuit case decided

the United States versus Rayborn (phonetic), United States versus Costa Czarez (phonetic) and United States versus Brookington (phonetic) and then it goes on. It does not, the comment goes on or the note goes on to say that it does not, it does require evidence that the firearm was available to provide protection to the defendant in connection with his drug trafficking, or to facilitate his success. The original version of this statute, some affirmative use of the weapon would require a nonviolent, nondrug trafficking crime, however, crimes in this category are no longer covered by this statute. The objection is overruled. I am going to add, however, to the paragraph the words after the words, I am talking now about the paragraph that starts out the phrase,"used a firearm," means having a firearm available, et cetera, I am going to add on to the end of that paragraph the words "or to facilitate success."

All right, any other objections?

MR. COHEN: Yes, Your Honor. Instruction Number 8. The last sentence of the first page, "You are instructed that malicious destruction of property is a crime punishable by imprisonment for more than one year under the laws of the State of Nebraska." I would object to that. This was a 1974 conviction under the laws of the State of Nebraska. There has been no evidence as to what the maximum penalty for that crime was at that time. In fact, the only evidence the Government

crime, a lesser included offense under Count I.

Instruction Number 7. The crime of using and carrying a firearm during and in relation to a drug trafficking crime, as charged against the defendant, Arnold F. Hohn, in Count II of the indictment has two essential elements, which are:

One, the defendant committed the crime of possession of Methamphetamine with intent to distribute; and

Two, during and in relation to the commission of that crime the defendant knowingly used or carried a firearm.

The phrase "used a firearm" means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

For you to find the defendant Arnold F. Hohn, guilty of the crime charged under Count II of the indictment, the Government must prove both of these essential elements beyond a reasonable doubt; otherwise you must find the defendant, Arnold F. Hohn, not guilty of the crime charged under Count II of the indictment.